United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-1011 75-1017

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS McNAMARA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX for APPELLANT McNAMARA

VOLUME IV
(Pages 1715a through 2342a)

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

73-CR-442

JOHN DE LISO, THOMAS MC NAMARA, :
ALPHONSE MEROLLA and
ALPHONSE M. MEROLLA, :

defendants, :

----------x

United States Courthouse
Brooklyn, New York

October 18, 1974
10:00 o'clock A.M.

Before:

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

EMANUEL KARR
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorneys for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M.Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, FBI

(The following occurred in the absence of the jury.)

MR. RITCHIE: Your Honor, we have a couple of 3500 documents to be marked.

MS. KATZ: Grand jury minutes regarding George Koch, dated May 16, 1973, which were marked in the prior trial as 3500-29.

THE CLERK: 3500-31.

(So marked.)

THE COURT: I have received this, this is a police department, County of Suffolk, field report, PDCS 10530, Central Complaint Number 72-14431. Incident, found property, complaint affecting John McNamara, date of occurrence June 23, 1972, Friday.

(The document was then handed to Mr. Gillen.)

MR. GILLEN: Thank you.

MR. RITCHIE: Can I share it?

THE COURT: Do you want to share it with him.

MR. GILLEN: I would like to see it myself.

THE CLERK: That is a letter received by the Court.

MR. GILLEN: Does your Honor want Mr. Walsh to keep this.

THE COURT: They seem to attach importance to that, so perhaps he should.

MR. GILLEN: All right, fine.

Could you mark it for identification.

THE CLERK: Yes, sir.

Do you want everything marked.

MR. GILLEN: Yes, please.

THE CLERK: Defendant McNamara's exhibit AY for identification.

(So marked.)

MR. GILLEN: Do you have the original.

THE CLERK: The question is does the Court have the original.

THE COURT: No, that is all we have.

MR. RITCHIE: Your Honor, I have previously turned over as Government's exhibit 3500-36 a one-page report of James Pavese, and I would like now marked grand jury minutes dated April 11, 1973 of the witness John Sini, which previously had been marked as Government's exhibit 3500-20.

THE CLERK: It is now 3500-32.

MR. RITCHIE: And I would ask that there be marked as 3500-33 the grand jury minutes of April 18, 1973 with regard to the witness John Sini which had previously been marked as Government's 3500-19 in the prior trial.

THE CLERK: Now 3500-33.

MR. RITCHIE: Your Honor, I've already turned over to defense counsel a one-page report of interview regarding Timothy Shea which was marked in this trial as 3500-29.

Your Honor, I would ask that there be marked as 3500-34 a two-page report of interview -- I am sorry, a four-page report of interview dated 3/1/73 regarding Thomas Gill.

That had been marked in the prior trial, I don't have that marking presently.

THE CLERK: Now 3500-34.

MR. RITCHIE: I believe it was turned over as Brady material in the last trial and not as 3500 material.

I think that is it.

I am sorry, your Honor, I have two more regarding Detective Gill to be marked, one is a one-page report of interview dated March 2, 1973 with regard to Detective Thomas Gill.

THE CLERK: 3500-35.

MR. RITCHIE: And as Government's 3500-36 a two-page report of interview dated March 29, 1972 with regard to the witness Detective Thomas Gill.

THE CLERK: So marked, 3500-36.

MR. RITCHIE: Your Honor, I believe we are

ready to proceed.

THE COURT: All right.

(At 10:40 o'clock a.m. the jury took its place in the jury.box.)

MR. RITCHIE: The Government will call as its next witness Thomas Gill.

T H O M A S P A T R I C K G I L L , called as a witness on behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Sir, what is your occupation?

A I am a police officer.

Q For which police department?

A I am assigned to the Suffolk County Police Department.

Q And what is your position, are you a patrolman or a detective?

A I am a detective assigned to the Homicide Squad.

Q And how long have you been assigned to the Homicide Squad?

A For the last nine years.

Q Now, do you know an individual named Harold

Goberman?

A Yes, I do.

Q And did you know him in June of 1972?

A Yes, sir, I did.

Q Directing your attention to June 5, 1972, did you have occasion to hear from Mr. Goberman?

A Yes, sir, I did.

Q And where were you at the time you heard from him?

A I was in the Suffolk County District Attorney's Office in Riverhead when I received a phone call from Harold Goberman.

Q And at that time did Mr. Goberman make a complaint to you regarding one Thomas McNamara?

A Yes, sir, he did.

Q And what did he say to you?

A He told me that he was having problems at the McNamara job and that a bunch of goons had showed up on the job and they threatened him with a gun.

Q That was --

THE COURT: What was the date of that, Mr. Gill.

THE WITNESS: That was June 5th, I believe.

THE COURT: Five?

THE WITNESS: Yes.

MR. RITCHIE: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. GILLEN:

Q Mr. Gill, would you tell us, please, if Mr. Goberman said anything about being beaten to you or did he just say that he was threatened with a gun, if you recall, sir?

A I believe he said he was pushed around and threatened with a gun.

Q Did you see him that day?

A Yes, sir, I did.

Q Did he have any physical marks of injuries of any sort whatsoever?

A No, sir.

Q Now, doyou know of a man by the name of Salvatore Spatsarella?

A Yes, I do.

Q Now, in or about April of 1972, did you observe Mr. Spatsarella?

A Yes, sir, I did.

MR. RITCHIE: Your Honor, I'm going to object to any further leading now, Mr. Gill has become a

defense witness.

THE COURT: Whatwas that.

MR. RITCHIE: I say that Mr. Gill has now become a defense witness.

THE COURT: I believe he is being examined beyond the direct, so you must not lead.

BY MR. GILLEN:

Q Well, did you ever see him down around Nesconset Highway on the McNamara Buick-Pontiac job site?

A Yes, sir, I did.

Q How many times?

THE COURT: Please don't lead, Mr. Gillen.

MR. GILLEN: Your Honor, I am in a strange position, quite frankly, and I think your Honor knows what I mean.

THE COURT: No, you are not.

MR. GILLEN: May I respectfully except.

BY MR. GILLEN:

Q What did you observe if anything at the McNamara Buick job site in connection with this man Sal Spatsarella?

A I observed Mr. Spatsarella on the job site on three different occasions.

Q Did you ever see him with Mr. Goberman?

A Yes, I did.

Q Now, can you tell us please whether you know a man by the name of Allan Goberman?

A Yes, sir, I do.

Q Did you have any conversations with Allen Gobermen with reference to the complaint of Harold Goberman?

A Yes, sir, I did.

Q Tell us when you first spoke to Allen Goberman, where this took place, when it took place, what he said to you and what you said to him?

A It was the same night that I had received the call from Harold Goberman and I met Allen Goberman and Harold Goberman at the Mt. Sinai Fire Department parking lot and I told Harold Goberman that I had stopped at the McNamaras and questioned him with reference to the complaint he had made to me earlier that day and they denied any gun being around or any violence, and I asked -- Harold Goberman told me that Allen was there and I asked Allen if he had seen a gun, and he said, "No."

(Continued next page.)

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Q Did you have any other, further conversations with Harold Goberman with reference to this alleged gun?

A Yes, sir, I did.

Q Would you tell us where, who was present and when and what was said by who?

A This was a few days later at the office of Len-Al Construction on Hoffman Avenue or Hoffman Lane -- I don't know the correct name of the street -- in Hauppauge and again I asked Allen Goberman if he had seen a gun and he said no.

MR. GILLEN: Nothing further, your Honor.

Just one more question.

Q Didn't Harold Goberman ever threaten Thomas McNamara in your presence?

A Yes, sir, he did.

Q What did he say?

A He told me that if his -- if Thomas McNamara didn't stop coming around the job and bothering him that his sons were going to find him laying face down in the mud.

Q When was this?

A This was sometime after the June 5th incident, I believe.

MR. GILLEN: Thank you.

Nothing further.

MR. RITCHIE: Any other questions?

MR. FISCHETTI: I have no questions.

MR. LEONE: No questions.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Now, are you a personal friend of --

MR. GILLEN: Objection, improper --

MR. RITCHIE: Your Honor, this is on cross-examination --

MR. GILLEN: Improper redirect, sir.

THE COURT: No, it is not.

Overruled.

BY MR. RITCHIE:

Q Were you a personal friend of John McNamara?

A Yes, sir, I am.

Q And have you obtained any orders from the McNamara Car Agency?

A Yes, sir, I have.

Q And you purchased it from them because you were a friend of the McNamaras; did you not?

A That is partially true.

Q You testified previously in this case, have you not, Officer?

A Yes, sir, I did.

Q And when you testified you appeared as a witness for the defendants; did you not?

MR. GILLEN: Now, your Honor, I object.

MR. FISCHETTI: I object to that.

THE COURT: That is quite beside the point.

MR. GILLEN: I would ask the jury be so instructed.

MR. RITCHIE: I am sorry.

THE COURT: What did you say?

MR. GILLEN: I asked that the jury be so instructed.

THE COURT: I have just said so.

MR. GILLEN: That is precisely what I wanted to bring out and couldn't.

THE COURT: Please!

BY MR. RITCHIE:

Q On that prior occasion, and I direct your attention to page 1756, line 17 and 18 -- I'm sorry, 18 and 19, were you asked this question --

MR. GILLEN: Will you just give us a moment Mr. Ritchie?

MR. RITCHIE: Okay, fine.

MR. GILLEN: May I have the page number, Mr. Ritchie?

MR. RITCHIE: 1756.

MR. GILLEN: I will object to this, your Honor, and --

THE COURT: May I see it?

(The document was handed to the Court by Mr. Gillen.)

(The following occurred at side bar without the hearing of the jury.)

MR. RITCHIE: That will be line 16 through 19.

Your Honor, there is a contradiction, I believe there is in light of the answer, now he has said that that is partially true when in fact last time he said "Yes" in response to this line of questioning.

MR. GILLEN: He said he was a friend and he said the same thing now.

MR. RITCHIE: No, it concerns the question, "Do you go in to purchase cars because you are a personal friend?" And last time he said, "Yes," this time he said, "Well, that is partially true."

MR. GILLEN: Where is the contradiction?

MR. RITCHIE: I believe there is a contradiction.

I will leave it to the Court.

THE COURT: You are referring to this?

MR. RITCHIE: Yes.

(Judge Dooling then produced the document.)

THE COURT: Well, well.

MR. RITCHIE: All right, your Honor, yes, your Honor.

BY MR. RITCHIE:

Q Now, when did you first meet either Thomas McNamara or any member of his family?

MR. GILLEN: I will object to that, your Honor. If he wants to say when he first met Thomas McNamara, no objection.

THE COURT: I am sorry.

MR. RITCHIE: I have a point to make, your Honor.

MR. GILLEN: Let him break it down.

MR. RITCHIE: I will make an offer of proof at the side bar.

(Continued next page.)

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(The following occurred at side-bar without the hearing of the jury.)

MR. GILLEN: My objection is, your Honor, that he knew Jimmy McNamara before June 5th and he first met Thomas McNamara and John McNamara to my knowledge on June 5th. Mr. Ritchie's question is all encompassing, When did you meet any of his family? It is like, When did you stop beating your wife.

MR. RITCHIE: He has informed me that he first met any of the McNamaras shortly before June 5th and that on June 5th he spoke with them and accepted their word and that on June 7th he was in Desmond O'Sullivan's office giving information about the McNamaras and that he had previously given information to the McNamaras about Goberman. He attended the wedding of John McNamara and purchased cars from the McNamaras. He has utilized the McNamaras, in conversations with Janet McCartney he told Janet McCartney that he could get back her car if she would provide information about Harry Goberman and about the murder, where Mr. Goberman was a witness for the prosecution.

MR. GILLEN: Yes, Mr. Goberman as a witness

for the People did meet Mr. Gill, but Mr. Gill did not meet Thomas McNamara until June 5th.

Now, if Mr. Ritchie wants to say, When did you first meet Thomas McNamara? Fine, but what he is doing is saying, Thomas McNamara or any members of his family, and no matter what he says he will think he has an inconsistency.

Why doesn't he ask his questions properly.

THE COURT: When did he first meet any of the McNamaras?

MR. GILLEN: Fine.

THE COURT: When.

MR. GILLEN: I don't know the exact date, it was prior to June 5th, and that was James McNamara.

MR. RITCHIE: He testified it was in April 1972 --

MR. MEISELMAN: Yes, that was James McNamara.

MR. RITCHIE: Yes, your Honor, that was James McNamara but in conversations with me now he tells me it may have been June -- April to June.

Now I am not particularly concerned with that, what I'm concerned with is that he hardly knew the McNamaras from June 1972 and yet he has purchased cars from the McNamaras and has been meeting with

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attorneys to the McNamaras, as well as Janet McCartney.

MR. GILLEN: Well, let me say this, I haven't gotten any 3500 or Brady material that you have turned over concerning Janet McCartney because -- and I haven't spoken to Janet McCartney, but --

MR. RITCHIE: I have not yet closed my case.

MR. MEISELMAN: Haven't you spoken with Janet McCartney.

MR. RITCHIE: Janet McCartney was interviewed by the Government.

THE COURT: He doesn't have to show it.

MR. GILLEN: Excuse me, your Honor, in that connection you will remember that there was a Brady demand at the last trial.

MR. RITCHIE: Your Honor, there is no Brady material, I will turn the material I have over to the Court, in fact I will turn it over to defense counsel, I don't mind, but my point is that Janet McCartney made allegations about Thomas Gill. We don't have Janet McCartney, we are not going to use her, but Thomas Gill was interviewed and he stated that he had gone looking for information from Janet McCartney and promised him assistance concerning the criminal acts of Harold Goberman.

MR. MEISELMAN: I think you will remember in the grand jury minutes that Thomas Gill testified and stated unequivocally in the grand jury testimony that what he said was on his behalf, that the McNamaras had nothing to do with it.

MR. RITCHIE: He never appeared at the grand jury, your Honor.

MR. MEISELMAN: Then in the 302.

MR. RITCHIE: The 302, that was not sworn testimony at any rate.

MR. MEISELMAN: What has the murder case there got to do with this.

MR. RITCHIE: He did state he did go back to the McNamaras --

THE COURT: What is the purpose of all of this.

MR. RITCHIE: To show a bias on his part.

MR. MEISELMAN: He was trying to use Janet McCartney as a prime witness against Harold Goberman in the homicide case and that is their side of the story.

THE COURT: He may inquire.

For heaven sake, will you please hurry up.

MR. GILLEN: Your Honor, may I say what has

5 Gill

been happening in this case is that the Government has been calling all the defense witnesses.

THE COURT: You are referring to Mr. Gill.

MR. GILLEN: Yes, sir, and now Mr. Ritchie claims bias, he called him as his witness.

MR. RITCHIE: I called him as a witness for a very narrow point.

MR. GILLEN: The testimony is no different whatsoever from the last trial.

Let me say this, you called him to lay a trap, and I want this on the record.

MR. RITCHIE: I am not trying to lay a trap for anything.

MR. GILLEN: He is going to call Ms. Tomaselli (phonetic) to make a statement.

THE COURT: Now, Mr.Gillen, you know the witness, you have interviewed him freely --

MR. GILLEN: Yes, sir, yes, sir.

THE COURT: Mr.Ritchie has called him te testify to one significant fact that is central in the case and you then took him over as a witness to bring out facts which are a part of the contentions of the defendants. Mr. Ritchie is free to pursue such further inquiries that would show the reasons

why he has testified as you have adduced through him, and this also lends additional force to the testimony brought out on his direct examination since it now becomes an unwilling confession by an unwilling witness.

(The trial then proceeded within the hearing of the jury.)

(Continued next page.)

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(The trial then proceeded within the hearing of the jury.)

REDIRECT EXAMINATION

BY MR. RITCHIE: (Cont.)

Q I will put that last question again: When did you first meet any of the McNamaras?

A My first meeting with the McNamaras --

THE COURT: Any of them, not as a group but any one of them.

A Any one of them, I was introduced to Tom McNamara by Harry Goberman at a trailer on the job site. It was only this Mr. McNamara and I said hello.

Q When did you --

THE COURT: Can you fix the time, Mr. Gill.

THE WITNESS: This would have been probably late April or maybe early May.

Q When was the next time you saw Mr. Thomas McNamara?

A June, I guess it was June 5th.

Q Prior to seeing Mr. Thomas McNamara on June 5th, had you met any other members of the McNamara family?

A Yes, sir, I did.

Q Which member or members?

A James McNamara.

Q And when you met -- when did you meet James McNamara in relation to June 5th?

A I believe it was in the latter part of May.

Q At that time did James McNamara talk to you about Harry Goberman?

A Yes, sir, he did.

Q And did he ask you your opinion ofHarry Goberman?

A Yes, he did.

Q And did you tell him that opinion?

A Yes, sir, I did.

Q And what didyou tell him at that time?

A James McNamara was concerned of the fact that Harry could be considered dangerous and I told him that to me he could be considered dangerous.

Q And you had never met any of the McNamaras prior to April 1972; is that correct?

A That is correct.

Q And did you attend the wedding of John McNamara in March 1973?

A No, I did not in March, no.

Q Were you -- did you, did you attend his wedding?

A Yes, sir, I did.

Q When was it?

A I believe it was in the summer of '73.

Q Wasn't that wedding originally set for two days after you first spoke with Detective -- with, with Special Agent Mullen with respect to this case?

A Yes, sir, it was.

Q And that was in March of 1973, wasn't it?

A Yes, sir.

Q And were you invited at that time; is that right?

A Yes, sir.

Q Now, do you know an individual named Janet McCartney?

A Yes, sir, I do.

Q And she is or was a girlfriend of Harry Goberman; was she not?

A Yes, sir, she was common-law with Harry.

Q Well, there is no such thing as a common-law wife --

A She was living with him.

Q She was living with Harold Goberman?

A Yes, sir.

Q Did you ever promise to get her car back from the McNamaras if she would supply information with regard to

the criminal activities of Harry Goberman?

A Yes, sir, I did.

(Continued next page.)

MP

Q That was after you met the McNamaras, was it not?

A Yes sir, it was. This --

Q Did you want to explain?

A This was, I'm not sure if it was prior to June 5th or after, it was sometime during that period.

Q Now, you testified that Harry Goberman threatened the life of Thomas McNamara in your presence, is that correct?

A Yes sir, I did.

Q Now, was Thomas McNamara present at that time?

A No sir, he wasn't.

Q It was you and Harry Goberman, right?

A That is correct.

Q In fact, at the time Harry Goberman was putting up some construction work on your house when this statement allegedly occurred?

A No sir, that is incorrect.

Q How did it come about? Where was this meeting?

A His brother Allen was putting up a shed in my back yard, a tool shed.

Q It was Allen, not Harold?

A Allen was putting up the shed. Harry stopped

by my house.

Q You had contracted with Allen, not with Harry Goberman, is that correct?

A That is correct.

Q At that time, was Harry Goberman aware of the fact that you were a homicide detective?

A Yes.

Q In fact, he had testified in that Somers case?

A Yes.

Q In fact, at that time, he was a prime suspect in that case, was he not?

A I was investigating him at the time, yes.

Q In fact, you told Desmond O'Sullivan about that fact, that you were investigating Harry Goberman, on June 7, 1972, did you not?

A I'm not sure if it was June 7. I believe it was closer to June 5.

Q You are not certain of the date?

A No.

Q You didn't make a record of it?

A No.

Q But you did appear in Desmond O'Sullivan's office, in Jimmy McNamara's apartment, and talked to

Mr. O'Sullivan about Harry Goberman's criminal background, did you not?

A Yes sir, I did.

Q This was very shortly after you first met the McNamaras, is that correct?

A That's correct.

Q This was subsequent to Harry Goberman having made a complaint to you about a beating by Thomas McNamara?

A That is correct.

MR. GILLEN: I object to the phrase beating by Thomas McNamara.

THE COURT: Yes.

MR. RITCHIE: I should rephrase that.

MR. GILLEN: Yes.

Q This is after the time when Harry Goberman had made that complaint about goons being on the job and his being threatened with a gun and pushed around?

A Yes.

Q Now, you have been a homicide detective for 9 years?

A Yes sir.

Q You are trained in the investigation of murders and the collection of evidence?

A Yes sir.

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Q Is it not a fact a statement of intention to kill a person could be crime evidence in a later prosecution of that person for the murder, the murder of Thomas McNamara?

MR. GILLEN: What murder? Here he is here (indicating).

MR. RITCHIE: I am well aware of the fact he is here.

THE COURT: Rephrase your question, Mr. Ritchie.

The question, do you believe that evidence of the threat to kill can be used in evidence against a person making a threat at a later trial of that person for the homicide of the threatened person?

THE WITNESS: Do I believe -- are you talking about the Silver Somers murder?

THE COURT: No, this is a general question.

A Through my investigative experience?

Q Yes.

A Could you ask me the question again?

MR. RITCHIE: Can you please read it back. The Court's question.

THE COURT: I thought Mr. Gill thought that it was so wound up that he couldn't answer it and that's why he asked you to ask it again.

Is that about it, Mr. Gill?

THE WITNESS: It sure is.

Q In general, would you consider a statement of intent to murder to be important evidence in a later murder prosecution of the individual threatened?

A Yes.

MR. RITCHIE: I have no further questions.

CROSS-EXAMINATION

BY MR. GILLEN:

Q Mr. Ritchie asked you about a woman by the name of Janet McCarthy, did she supply you with information about Harry Goberman's involvement in the Silver murder?

A Yes.

MR. RITCHIE: Objection.

THE COURT: Overruled.

A Yes, she did.

Q Isn't it a fact she told you that Harry Goberman admitted to her that he hit Silver with a pipe?

MR. RITCHIE: Objection. Hearsay.

THE COURT: She could not have admitted it, she could make that assertion, Mr. Gillen.

Q Did she make such an assertion?

A She told me that Harry Goberman participated in the murder along with Sam --

MR. GILLEN: Thank you, no further questions.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Detective Gill, has Harry Goberman ever been prosecuted for that murder?

A No.

Q Isn't it a fact that you put him on the stand as a witness in that murder?

THE COURT: He did not try the case, I'm sure.

Q Is it not a fact --

MR. GILLEN: I object.

THE COURT: The jury is fully informed about the fact that he was a witness in the trial as you remember.

Next question.

MR. RITCHIE: I have no further questions.

MR. GILLEN: Nothing further.

MR. LEONE: No questions.

THE COURT: All right, Mr. Gill, you are excused.

(Continued next page.)

MP:jm
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MR. RITCHIE: The Government calls J. Timothy Shea.

J. T I M O T H Y S H E A , called as a witness on behalf of the United States of America, having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Shea, your full name is John Timothy Shea?

A Yes.

Q You are an attorney at law?

A That is correct.

Q How long have you been such?

A Almost ten years.

Q With what law firm are you associated?

A Gunnigle, that's C-u-n-n-i-g-l-e, Killian, K-i-l-l-i-a-n, Johnson, and Shea.

Q And you are a partner with that firm?

A Yes.

Q How long have you been associated with that firm?

A Well, I was employed in November of 1966 by the firm that was then known as Gunnigle, Killian and Johnson.

Q And you became a partner and it became Gunnigle, Killian, Johnson, and Shea?

A Yes, that was in 1970.

Q Where is the firm's office?

A Port Jefferson, New York.

Q What type of practice do you have, civil or criminal?

A Civil practice, basically.

Q Have you ever -- withdrawn.

Do you know an individual by the name of Thomas McNamara?

A Yes.

Q When did you first meet Mr. Thomas McNamara?

A I would say in 1967. Perhaps '66, '67. When I first came out -- within six months to a year I met Thomas McNamara for the first time.

Q If you know, when did your law firm represent Mr. Thomas McNamara?

A I believe that would have been somewhere around '68 or '69.

Mr. McNamara was represented by another attorney, a Mr. Arthur Bergen, when I first went with the firm in 1966.

Q Now, have you ever represented Mr. McNamara?

A Yes.

Q Have you ever represented -- did there ever come a time you handled any McNamara corporate accounts?

A Yes, I did some work for McNamara Buick-Pontiac and some work for McNamara Re New Car Corp. There are one or two other corporations which we either incorporated or had something to do with in working for Mr. McNamara.

Q So Mr. McNamara has had a number of corporations?

A Yes.

MR. MEISELMAN: Objection.

THE COURT: What?

MR. RITCHIE: Has had a number of corporations.

MR. MEISELMAN: That is completely irrelevant.

MR. RITCHIE: I will withdraw it.

BY MR. RITCHIE:

Q Can you explain to the jury what type of corporation McNamara Buick-Pontiac is, what its business is, and what type of corporation McNamara Re New Cars, Inc. is and what its business is?

MR. MEISELMAN: I object. If your Honor pleases, I object with respect to McNamara Buick-Pontiac --

THE COURT: In the light of what we were discussing yesterday, I think it is best.

A McNamara Buick-Pontiac, Inc. is a franchise

Shea-direct

of General Motors, franchise dealer of General Motors and they have a franchise agreement. I think it was incorporated somewhere in the 50s when Mr. McNamara first opened up his dealership. We, as a firm, began to represent McNamara Buick-Pontiac, as I said, when Mr. Bergen became associated with our firm and Mr. McNamara's business became our business and my partner, Mr. Johnson, represented McNamara Buick-Pontiac at that time.

Q Would it be fair to say McNamara Buick-Pontiac sells cars?

A Yes.

Q Do you know where it sells cars at the present time, if you know?

MR. MEISELMAN: Objection.

THE COURT: I think we better have that in the record.

A Yes, in Port Jefferson. On Nesconset Parkway.

Q When was that built?

A The summer of 1972.

Q Would it be spring-summer, 1972?

A I believe it started in the spring and completed somewhere in the fall or end of summer, 1972.

Q Then it opened, and cars were sold out of that showroom?

Shea-direct

MR. MEISELMAN: Objection.

A Yes.

THE COURT: Overruled.

Q Prior to the time that McNamara Buick-Pontiac was selling cars from the showroom on Route 347, if you know, where had it been selling cars previous to that?

A That would be Port Jefferson, by the harbor, 25A, which is called Main Street in Port Jefferson.

Q Is that old building located at the intersection of Main Street and 25A?

A That is correct.

Q As a matter of fact, it isn't an intersection, it is a "T"?

A A "T" right down to the harbor. Main Street goes to the harbor and "T's" out to 25A.

Q What, if you know, is the business of McNamara Re New Cars, Inc.?

A From what I know, it was incorporated in 1969, September of 1969. Unknown to me, my partner Bill Johnson incorporated it in September of 1969. There was no work done for that corporation as far as I know since then, since September 1969. It was left as a dormant corporation. I don't have any personal knowledge of the original purpose for the incorporation, but it was in 1969.

Shea-direct

Q Did you do any work for McNamara Re New Cars, Inc. in 1972?

A '72, yes, sir.

Q In 1972, what, if any, business was McNamara Re New Cars conducting?

A Number one, it was, according to the Government contract, February 1972, construction contract -- after it was entitled, became the title holder of the property upon which the new building was constructed in Port Jefferson.

Q Would it be fair to say that McNamara Re New Cars, Inc. was a holding company for the land and building in which McNamara Buick and Pontiac conducted its business?

MR. MEISELMAN: Objection.

THE COURT: On what grounds, Mr. Meiselman?

MR. MEISELMAN: It calls for a legal conclusion, and another ground, your Honor, the ground set forth at the side bar.

THE COURT: It certainly calls for a legal conclusion, but I think that the idea of holding company is plain enough if Mr. Shea and Mr. Ritchie are clear about what it held.

MR. MEISELMAN: If Mr. Shea is familiar with the operation of Mr. McNamara's mind.

Shea-direct

THE COURT: No, but the property of the company doesn't hold stock in other companies?

THE WITNESS: As far as I know, no.

THE COURT: Just holds a piece of land on which the dealership is located on Nesconset Highway, is that correct?

THE WITNESS: That is correct.

THE COURT: What else, if anything, does it hold, as far as you know?

THE WITNESS: I think that is it. As far as I know, I believe that is the only asset the corporation has. Certainly the principal asset in 1972.

BY MR. RITCHIE:

Q You testified you did conduct -- acted in a legal capacity for McNamara Re New Cars, Inc. in 1972?

A I performed some service for McNamara Re New Cars, Inc.

Q What was the first time you performed any service for McNamara Re New Cars, Inc. in 1972?

A I believe it would have been on or about May 10, 1972.

Q What were the activities that you conducted on their behalf?

Shea-direct

MR. MEISELMAN: Objection.

THE COURT: Overruled.

A I prepared, at the request --

MR. MEISELMAN: May I respectfully submit the objection is based on the objection I submitted to your Honor at side bar?

THE COURT: I quite understand.

A I prepared two documents for -- at the request of Thomas McNamara on or about May 10. One was a waiver of mechanic's lien and the other was a general release.

Q When you say a general release, was that on May 10, 1972?

A That is correct.

Q Can you explain how long the release was?

A One page, Blumberg form.

Q Is it a form?

A Yes.

THE COURT: A printed form which you filled out?

THE WITNESS: That is correct.

Q Is it with regard to the release to any right to mechanic's lien?

A There is some language, I believe, in the release, the May 10th release, which relates to the

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mechanic's liens. I inserted some language, I believe, in which the releasing party would waive a right to file a mechanic's lien.

In addition, I had a separate document which was a waiver of mechanic's lien and for that purpose there were two documents.

Q Now, directing your attention to June 6, 1972, on that date did you have occasion to prepare a legal document for McNamara Re New Cars, Inc.?

A Yes.

Q What was the document that you prepared on that date?

MR. MEISELMAN: I don't wish to keep interrupting, but if Your Honor would grant me a continuing objection from this moment on, I will refrain from making objections.

THE COURT: As I understand the ground, it would not be applicable to this series of questions which I believe is directed to quite another thing.

A The document was an agreement to cancel contract and release.

Q Now, I show you what has already been marked in evidence as Government's Exhibit 16.

I ask you to look at it?

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A Yes, sir.

Q Is that the document that you prepared on that day?

A Yes, a photostatic copy of the document I prepared.

Q I'm sorry, that is right.

In the course -- on that date, what officials of McNamara Re New Cars, Incorporated did you deal with in connection with the preparation of this document?

A John McNamara and Thomas McNamara.

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Q Upon the execution of that document, what would be its import with relation to the liability of Thomas McNamara and the liability of Harold Goberman on the contract?

MR. MEISELMAN: Objection, your Honor.

THE COURT: Harold Goberman and HarMac?

Q Harold Goberman and HarMac Contracting Corp., what would be the liability of the respective parties?

THE COURT: Do not answer.

MR. MEISELMAN: Objection.

THE COURT: On the grounds that the instrument speaks for itself?

MR. MEISELMAN: Yes.

THE COURT: But it is so long.

MR. MEISELMAN: It would properly bring an instruction on your Honor's part rather than from the witness.

THE COURT: I think the jury wants to hear it now. This is simply for economy of time.

THE WITNESS: Do you want me to read the document, your Honor?

THE COURT: Heavens no. But if that is the only way you can present it properly --

THE WITNESS: No, I can paraphrase what it

contains.

THE COURT: Please do.

THE WITNESS: It is an agreement, cancellation of contract and release, between Harry Goberman and HarMac Contracting Corp. and McNamara Re New Cars Inc. It is an agreement to cancel the contract of February 1972. It contemplates consideration and it spells out the liabilities of both parties from the date of the cancellation of the contract, which would be whenever this thing was signed.

Q Under that release, would HarMac remain liable for the payment to subcontractors for work done?

A Yes. Any work done up to the time of the signing of the agreement.

Q Is there a warrant by the builder, HarMac Building Corporation, that it had paid all material and holds harmless the owner McNamara Re New Car Inc. on any liens by the subcontractors?

A I believe so. I want to find it to see if you are paraphrasing it correctly.

There is a representation that the builder received all payments from the owner for any work performed to date and all the subcontractors and material men have

paid by Mr. Goberman or HarMac as of the date of the release. The builder releases the owner from any actions with respect to the February 24th contract. There is another paragraph in which the builder waives again his right to file a mechanic's lien on the property. And there is an indemnification and hold harmless agreement to the builder running to McNamara Re New Cars for any actions that may be taken by any material men.

Q Indemnification basically means if you are sued you've got to pay and I will pay you back?

A To put it in the parties here, it would be if Mr. Goberman had not paid the subcontractors and the subcontractors would sue McNamara, McNamara would be able to look to Goberman for his failure to pay the subcontractors.

Q At the time that you prepared this document, were you informed by the McNamaras about Harold Goberman's criminal background?

A Yes, generally. I don't think that they gave me his record but they did tell me he is a man of a criminal nature.

Q When did you finish the preparation of this contract release?

A That day, June 6, 1972 in the morning.

Q What if anything did you do with the original

or any copies made at that time on that date of that contract release?

A I saw John and Tom early in the morning at the construction site and had a discussion at a diner, Chuckie's up the street.

Q Chuckie's Charcoal Broil is it?

A I believe that's what it's called. I went back to the office, dictated the cancellation agreement to my secretary. It was completed within -- it's three or four pages -- I would say within an hour. I read it. I had an appointment coming up and I asked my secretary to give John McNamara a call and tell him it was ready and to come down and pick it up. I don't know how many copies, ordinarily three or four copies of a document like this are made. So it would be three or four copies prepared that day.

Q Did you retain any copies of that document at the time in its unexecuted form?

A Usual office procedure I believe was followed, we did have one copy which we retained in the file.

Q Now, you were the attorney who prepared that release, is that correct?

A This agreement to cancel?

Q Yes.

A Yes.

Q Were you present at the time it was executed?

A No.

Q When was the next time that you saw the original of this release in an unexecuted form?

THE COURT: If ever?

Q If ever?

A That would have been in August or September of 1972.

Q And who if anyone presented it to you at that time?

A I believe it was John McNamara and Jim McNamara.

Q Did you keep the executed release at that time?

A I am not sure. It was brought in in August or September. I may have had it for a day or two before I returned it. It might have been the same day. I don't recall whether the first or second day, but I did have it and read it and so forth and studied it.

Q What is the normal procedure that you followed with relation to the custody of executed legal

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documents that you prepared for a client?

A I would keep them ordinarily.

(Continued next page.)

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Q Did you do that in this case?

A In this case no, maybe for a short time, perhaps for a day or two but that is all.

Q What, if anything, did you do after that short period of time?

A I returned the cancellation agreement to John McNamara and Jim McNamara.

Q Did you return anything else to them at that time?

A No, it would have been the agreement I would have returned.

Q The original form?

A The original and I believe whatever copies were there.

Q Would you turn over any unexecuted copies of that agreement on that day?

A I believe I did, yes.

Q Was that upon the request of an individual?

A Yes.

Q Whose request?

A John McNamara and Jim McNamara.

Q Did there come a time in the early part of 1973 when you met with Special Agent Richard McMullen in this building?

A Yes.

Q On how many occasions?

A Twice I believe in February.

Q When was the first of those occasions if you can set a precise date?

A February 5.

Q And who if anyone was there besides yourself and Special Agent McMullen?

A Raymond Bergen who was a lawyer who was representing the McNamara's as well as I, yourself and Mr. McMullen.

Q On that date, by the way Mr. Raymond Bergen is not the say Mr. Berger associated with your office?

A No, he is not, he is a partner of -- in the firm of William Koloney and Telefano and was representing Thomas and John McNamara in connection with the investigation going on at that time I believe.

MR. LEONE: May we have the date, February of what year?

THE WITNESS: 1973.

THE COURT: February 5, 1973.

Q And at that time was there a discussion concerning any releases in connection with that McNamara-Goberman job?

A There was a discussion which lasted for quite a while and we spoke about many things. The subject of the release did come up during the course of that discussion.

Q And what if anything was it about the release, what if anything was said about the documents in general pertaining to this -- to that McNamara-Goberman job?

A I believe Mr.McMullen had asked where the release was or a filed copy of it.

Q Had you at any time prior to Mr. McMullen's discussion for the release offered to produce any documents that the Department of Justice wished?

MR. MEISELMAN: I am going to object to that.

A I had never been asked prior to that day.

Q On that day prior to Mr. McMullen speaking --

A I do not understand the question.

THE COURT: Did you offer to make all documents available whether or not you were asked?

THE WITNESS: No, I certainly did not.

Q What if anything did you say at the time that Mr. McMullen requested the release? By the way, did he request any specific release?

A Yes, the June 28, cancellation agreement.

Q He specifically mentioned June 28, 1972 cancellation agreement?

A I believe so, I cannot be definite it was specific. I believe that is what he was asking for in my mind.

THE COURT: You identified what he was asking for was the release you returned to the McNamara's.

THE WITNESS: Yes.

Q What if anything did you say after he requested the release?

A I told him I didn't have a copy of the release.

Q Is it not a fact, Mr.Shea, thatyou stated that the only release ever executed in connection with this job was the May 10, 1972, release?

A Absolutely not.

Q And yet in March 1973, a subpoena was issued in McNamara re NuCars Inc. requesting documents including any releases, is that not correct?

A That is correct.

Q And yet on April 18, 1972, when Alex Gniazdowski was subpoened to appear before the Federal Grand Jury as a witness you appeared tc speak with him, did you not?

A I appeared to speak with him?

Q You appeared at McNamara Buick-Pontiac after you received the call from Thomas McNamara to speak with Alex Gniazdowski.

MR. GILLEN: Let Mr. Ritchie take the witness stand, he is testifying.

THE COURT: I am afraid the question was objectionable.

Q After you state you informed Mr. McMullen there was no contract release is it not a fact --

MR. MEISELMAN: I objec t.

A I did not say that Mr. Ritchie.

Q What did you say.

THE COURT: The witness has just testified as to what occurred between him and Mr. McMullen on February 5.

Q Did you appear before a Federal Grand Jury -- did youappear representing John Sini before a Federal Grand Jury in April of 1973 pursuant to a subpoena issued to McNamara re Nu Cars Inc. for any and all documents pertaining or relating to the contract release specifically mentioned in any general or partial release.

MR. MEISELMAN: Your Honor, I lost that question somewhere.

THE COURT: No. Were you subpoened to appear before the Grand Jury in or about April, with all the documents including the release?

THE WITNESS: No I was not subpoened.

THE COURT: Who was?

THE WITNESS: I believe it was the custodian of the records of McNamara re Nu Car Corp.

THE COURT: You accompanied them?

THE WITNESS: I accompanied Mr. Sini, who went into the Grand Jury with the documents. I accompanied him as representing McNamara re Nu Car Corp.

Q And subsequent to that date did you confer with Alex Gniazdowski when he received a forthwith subpoena to appear before the Federal GRand Jury?

A I spoke to him on that date, yes.

Q What if anything did you say to him at that time?

A That was the morning, in fact it was the same day that John Sini was to appear before the Grand Jury.

I think it was the 18th of April, of 1973. I was going in with Mr. Sini and had made arrangements to drive in with Mr. Sini that morning.

I went over to the McNamara showroom and at that time Mr. McMullen had appeared with a subpoena for Mr. Gniazdowski to go in onthe same day. I had a conversation with Mr. Gniazdowski that morning before he went in.

Q What, if anything, did you say to him and what, if anything, did he say to you?

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Shea-direct

A Mr. Gniazdowski was agitated because he had just been served with a subpoena to be taken out of his job immediately and brought into the Grand Jury.

Q Is that what he said to you?

A No, that is the way he appeared to me.

Q I specifically put to you the question what if anything did he say to you and what if anything did you say to him?

MR. GILLEN: Objection your Honor.

THE COURT: Overruled.

A I told Mr. Gniazdowski that if he wished he could call an attorney before he goes in to testify before the Grand Jury, if he wanted some kind of advice. He obviously was nervous. He told me, "Mr. Shea, you are my lawyer. You can, you know, give me whatever advice I need in response to that."

I told him in that case then to get in the car immediately and go to the Grand Jury and answer whatever questions are asked of him.

Q Now you later appeared inthe Grand Jury that day with another of your clients, is that not so?

MR. GILLEN: In the Grand Jury? That gives an impression which is incorrect --

Q You represented an individual appearin g in

the Grand Jury that day or later that day, is that not correct?

A I represented McNamara re NuCar Corp. and I went in with the custodian of the records.

Q Who was the custodian of the records?

A John Sini.

Q And what -- when had he become custodian?

A When had he become custodian?

Q Yes.

A He is the general bookkeeper, checkwriter, he is the man who does most of the business records for the dealings of the dealership.

Q Do you know the subpoena that he appeared pursuant to, when it was served upon McNamara re Nu Car INc.?

A Not the date. I would imagine a couple of days before or perhaps ten days.

MR. MEISELMAN: I object to this, I do not follow it.

THE COURT: Overruled.

THE CLERK: Document marked for identification Government Exhibit 26; so marked.

(Continued on next page.)

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Q I show you what has been marked Government Exhibit 26 for identification and I ask you to look at it and see if that refreshes your recollection as to the date on which that subpoena was served?

A It says March 29, 1973. I still have no independent recollection as to when it was served.

Q Will you accept that date?

A Yes, I would say around that date, yes.

Q In fact after the subpoena was served -- this subpoena was for the fourth day of April, was it not?

A I am not sure.

THE COURT: It was what?

Q This subpoena required production on the 4th day of April did it not?

A That is the return date, yes.

Q And subsequent tothe receipt of this subpoena is it not a fact that an adiournment was requested until the next week, the 11th of April?

MR. MEISELMAN: I am going to object.

THE COURT: Let us move along quickly, please.

Q At any rate Mr. Sini appeared on April 18th, did he not?

A Yes. An adiournment was requested by Mr. Raymond Bergen.

Q Had Mr. Sini been the custodian of records of those documents on March 29, 1973?

A As far as I knew he was, yes.

Q Isn't it a fact that during the course of the last trial while you were present, Mr.Sini stated that he had not been the custodian of records --

MR. GILLEN: Objection.

MR. FISCHETTI: Objection your Honor.

THE COURT: Objection sustained.

Now, let us move along.

Q Now, in whose files were the records that were produced kept?

A They were mostly in Mr. Thomas McNamara's file cabinet which was in an office at the showroom with a couple of desks in it.

Q His personal file cabinet?

A Personal file cabinet? There were business files, they did not have personal records as far as I know, business records.

Q But they were the files that he used in the course of his activities in connection with McNamara Buick Pontiac and McNamara re Nu Car Inc.

MR. MEISELMAN: Objection.

THE COURT: If the witness knows he may say.

Shea-direct

A I do know that there was a file cabinet in this office that MR. McNamara kept records in. This was the file cabinet that most of the records for McNamara re Nu Car Corp were contained. That is where they were found when we went to answer the subpoena. There may have been other records in the file cabinet. I do not recall whether or not there were or how many there were or what they dealt with.

Q Prior to answering this subpoena did you have a meeting with Raymond Bergen, Thomas McNamara to pick the documents to be used pursuant to the subpoena.

MR. MEISELMAN: I'm going to object to the form and content of the question.

THE COURT: Overruled. Let us move along quickly.

A We met in the -- in my office. Mr. Raymond Bergen, Thomas McNamara and I believe John was there, possibly John, yes, John, Sini was there, Jim McNamara was there I believe. They had come in with boxes of records to be reviewed by counsel to determine what documents were encompassed by the subpoena and should be produced by the subpoena and what documents were not encompassed by the subpoena and were irrelevant and not to be sent down.

Q Was there a meeting and were documents selected?

A Yes there was a lengthy meeting at which we

went over every single document that was there.

Q On April 18, Mr. Sini did appear in the Grand Jury, did he not?

A Yes, he did.

Q And you were present with him, were you not?

A Well, I assumed he went into the Grand Juryroom to testify. I was not with him in the Grand Juryroom.

Q Did you see him enter the Grand Juryroom?

A See him enter it?

Q Yes.

A I do not recall if I saw him enter it or not.

Q At any rate your assumption is fairly firm, is it not?

A I believe he testified before the Grand Jury. I did not see him.

THE COURT: He came down to the Grand Jury apparently to testify.

THE COURT: I will accept that.

Q When Mr. Sini appeared before the Grand Jury prior to that had he been with you in the offices of the prosecutor,United States prosecutor?

A I believe we went to your office when we arrived at the building.

Q Was Mr.Sini aware of all the documents that

were being produced and had been produced?

A Aware of them? He had them with him and he was with us when we went over it, most of the time, not the entire time but I think most of the time he was there.

Q Was he aware or familiar with everyone of those documents?

A Familiar with them? He had seen them, let us put it that way when we went over them. I do not know how familiar he was with them.

Q He was not very familiar was he --

MR. GILLEN: Objection.

THE COURT: All right, let us move along. Objection sustained.

Q Now, did Mr. Sini know whether all contract releases that had been made out in connection with that job were being presented that day?

MR. FISCHETTI: Objection your Honor.

THE COURT: He cannot know what was in Mr. Sini's mind. Objection sustained.

Q Was he asked that by me and did he answer the question --

MR. FISCHETTI: Objection, whether he was asked by Mr. Ritchie.

THE COURT: Please let us move along with this.

Q In connection with your representation of McNamara re Nu Cars Inc. did you have occasion to file an answer and counter-claim in a civil suit filed by Harold Goberman and or HarMac Contracting Corp?

A YEs I did.

Q At the time that you filed that answer and counter-claim were you aware of the fact that that contract release you prepared on June 6, 1972, had been executed by Harold Goberman?

A Yes.

Q And in connection with that answer and counter-claim did you interpose a defense of that particular release?

A No I did not.

Q What was your reason for not interposing that defense?

MR. LEONE: Objection.

MR. MEISELMAN: Objection.

THE COURT: Overruled.

A Because this was based on conversations that I had with my client and my legal advice at that time was that the document was legally unenforceable and should not be used.

Q Why was it legally unenforceable.

MR. MEISELMAN: Objection.

THE COURT: On what grounds did you conclude, if you did, that it was unenforceable?

THE WITNESS: The consideration which was I believe something like $25,000, which was the figure, had not passed hands from McNamara to HarMac Contracting or Harold Goberman.

Q In other words, --

MR. GILLEN: Objection.

THE COURT: In other words will not be necessary. He expressed himself clearly and directly.

Q I show youwhat has been marked Government Exhibit 17 in evidence. I ask you if you have ever seen that document?

A Yes I have.

Q And when did you see that document?

A I do not recall the exact date. I saw it but it should have been around the time of SEptember when I saw this exhibit 16.

THE COURT: September, 1972?

THE WITNESS: Yes, 1972, your Honor.

Q AT the time that you filed the answer and counter-claim in that civil suit were you aware of the existence of that receipt?

A Yes I was.

Q What consideration, what payment does that receipt --

MR. MEISELMAN: Objection.

THE COURT: It is before the Jury, they know.

A $25,000 it says.

Q And is that the consideration contemplated in that cancellation of release?

MR. MEISELMAN: Objection your Honor.

THE COURT: Overruled.

A The cancellation does not recite any amount of consideration. It just recites, I believe, $1. perhaps.

Q $1. in value?

A It says in consideration of the sum of $1. and other good and valuable consideration, is what Government Exhibit 16 says.

Q What was the sum contemplated as consideration for that document?

A I do not know.

Q Were those two documents executed on the same day?

A They are dated the same day.

Q Didn't you testify previouslv that $25,000 --

MR. MEISELMAN: Objection.

THE COURT: It is dated the same day he says.

A I was not there when it was dated.

THE COURT: They are dated the same date.

THE WITNESS: Both are dated June 28, 1972, both.

Q What was the consideration contemplated in connection with that?

THE COURT: If you know.

A I did not know.

Q Did you ever learn what the consideration contemplated was?

A Yes.

Q When did you learn that?

A Around September of 1972.

Q What was the consideration that you learned had been contemplated in connection with the execution of that release?

A $25,000.

Q And you have a receipt there for, the $25,000?

A Government Exhibit 17.

Q Isn't that proof that the consideration had passed hands?

MR. MEISELMAN: Objection.

THE COURT: Overruled.

THE WITNESS: Isn't it proof?

Q Yes.

A Well, it certainly recites $25,000 was received by HarMac and Harry Goberman.

Q In connection with that answer and counter-claim, would not that Government Exhibit 16, that agreement of cancellation and release, constitute an affirmative defense and total bar to any recovery of a breech of contract action by Harold Goberman and/or HarMac contracting?

A If the consideration had actually passed hands, yes it would.

MR. RITCHIE: I have no further questions your Honor.

(Continued on next page.)

FK:tr
T3R3

MR. MEISELMAN: I have one or two questions your Honor.

CROSS-EXAMINATION

BY MR. MEISELMAN:

Q Do you know Mr. Sherman?

A Mr. Sherman, I knew Mr. Sherman.

Q In 1973 would you estimate approximately how old Mr. Sherman was?

A He was elderly.

THE COURT: He appeared to be elderly?

THE WITNESS: He appeared to be elderly.

Q Would you say he at least was in his 80's?

A I would say at least 70. He appeared to be older, I do not know his exact age.

Q Did he die in 1973?

A I know he died in 1972 or '73, I forget the date.

Q Do you know before John Orsini took over the job as general accountant or offic manager, whatever he was called, did Mr. Sherman do those duties before?

A Yes, he was the bookkeeper, general bookkeeper for McNamara Buick-Pontiac.

Q In the contract termination agreement where you were asked to recite the contents, can I ask you sir,

are these the usual covenants, conditions or terms of a termination of contract agreement?

A Yes.

MR. RITCHIE: Objection.

THE COURT: I take it you are referring to the use of the expression for one dollar and other good and valuable consideration as being a convention in the drafting of such instruments?

MR. MEISELMAN: Yes.

THE WITNESS: The answer is yes.

MR. RITCHIE: I will agree to that, that is perfectly fine.

Q The terms of the agreement itself, are they the usual terms of a contract termination agreement?

MR. RITCHIE: Objection your Honor.

THE COURT: No, objection is overruled.

A Yes, they deal with the same subjects and cover the same areas as any agreement to cancel a contract would.

MR. MEISELMAN: Thank you sir.

MR. RITCHIE: I have no further questions.

MR. LEONE: No questions.

THE COURT: You may step down Mr. Shea.

I think the jury and I would like a recess.

Please do not discuss the case with each other or anyone not on the jury before the case is given to you to decide.

(the jury left the court room.)

MR. FISCHETTIE: I was going to ask your Honor for a limiting instruction limiting as to my client, of this testimony.

I will discuss it with Mr. Ritchie who is in the hall.

THE COURT: If they accept this as evidence of spoliation on the part of McNamara with Shea, etc., that does not touch MR. Fischetti's client.

Would you discuss that, Ms. Katz, with Mr. Ritchie?

(A recess was taken.)

MR. FISCHETTI: Most respectfully, on behalf of John De Liso I ask the Court, if your Honor will give a limiting instruction with regard to this evidence by Mr. Shea of the meeting in February and the contract release and subpoenas to Mr. Sini and to Mr. Shea and everything that has transpired subsequent to June 28.

I would ask your Honor, if your Honor consents to give me such limiting instruction, not to

use the phrase with the jury that this evidence concerns spoliation of evidence but just merely refer to the testimony with regard to this.

MR. RITCHIE: Your Honor I do not oppose a limiting instruction. I do not know what your Honor should say and leave that to your Honor. I would not oppose a limiting instruction just to the defendant, Mr. McNamara.

I think it is perfectly proper in this case.

MS. SELTZER: I join in that motion with regard to Alphonse M. Merolla.

MR. LEONE: And I join in that motion for my client, Alphonse Merolla.

As I recall, the indictment does not say anything about spoliation or does not have the dates.

MR. RITCHIE: The date of the indictment is through May of 1973.

THE COURT: What it says in paragraph 3, "From on or about June 1, 1972 up to and including the date of the filing of this indictment, both dates being approximate and inclusive."

MR. RITCHIE: It is the problem about evidence of concealment in connection with the conspiracy. I know in the normal instance it is not allowable

as precariously as other members of the conspiracy. I remember I got in against all members of the conspiracy and as an act in the cause and furtherance of the conspiracy but that had to do with the filing of a false statement to an agency of the Federal Government and in that connection concealment, I argued and it was held, that would be properly admissible as an act in the cause and furtherance of a conspiracy.

I am not certain in this case.

THE COURT: Well if I may say this, the very nature of the conspiracy alleged, that is to obtain the contract release and the receipt with or without the payment, would be one that would seem by its essential terms to not contemplate the concealment of the instrument which had no value except as published.

In other words, if it was never published and never used in effect, the defendant had the whole purpose of the conspiratorial activities so I would not think that it is easy to argue here that all those who participated in the conspiracy would have contemplated that this sort of act in concealment of the conspiracy would ensue.

I think you can assume they all assumed that everybody would keep quiet by the use of force and so on and so on.

But not that they would destroy or otherwise conceal the very fruit of the conspiracy.

From that point of view I would think the limiting instruction is a proper one unless by the time we release the rest it is anticipated that there will be some evidence that the defendants other than the McNamaras had some knowledge or notice that this action was going to be taken.

I do not recall any such evidence.

(Cont'd on next page.)

MR. LEONE: I think Mr. Ritchie can answer that.

THE COURT: I don't recall any such evidence.

MR. RITCHIE: The Government will not produce any such evidence, your Honor.

THE COURT: That would simply be the matters relating to the location or production of the receipt, the release -- that is the cancellation and alleged release of the construction contract and the receipt.

MR. FISCHETTI: That is right.

THE COURT: Now, should that wait until after the Tinker man testifies?

MR. RITCHIE: The Tinker man, the Government anticipates, will be its last witness.

THE COURT: Well, that will be another hour or so.

MR. RITCHIE: It shouldn't be too much after that, your Honor.

THE COURT: Okay.

Maybe we had better wait until after the Tinker man.

MR. RITCHIE: Will we take up any motions outside of the presence of the jury and before the Government states that it rests?

THE COURT: Before what, Mr. Ritchie?

MR. RITCHIE: Before the Government officially states it rests.

THE COURT: Well, when you tell me you have the gleam of resting in your eyes, we will have a recess and then do that.

Okay?

(The trial then proceeded within the hearing of the jury.)

MR. RITCHIE: The Government calls John Sini.

J O H N S I N I , called as a witness on behalf of the Government, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Now, Mr. Sini, what is your occupation?

A I am a CPA.

Q And also an accountant?

A I beg your pardon?

Q Well, I am sorry.

How long have you been employed by Mr. Thomas McNamara?

MR. MEISELMAN: Objection, your Honor, I believe it is -- well --

THE COURT: By whom are you employed?

3

Sini-direct

MR. MEISELMAN: Yes, sir.

A By McNamara Buick Pontiac since August of 1972.

Q And what was your employment before August of 1972?

A I worked for Tomothy McNamara.

Q Was that in connection with his business?

A Yes.

Q What business is that?

A McNamara American.

Q That is an American Motors franchise dealership; is that correct?

A Yes, it is, yes.

Q Now, what were your duties as a certified public accountant at McNamara Buick Pontiac?

A I handle all the general bookkeeping and the business end of our dealership financing.

Q Have you ever been employed by McNamara Re: New Cars, Inc.?

A No, I don't think anybody has, it is just a shell corporation owned by Thomas McNamara. I have helped with the books.

Q If you know, how many employees are there -- how many stockholders are there in McNamara Re: New Cars,

Sini-direct

Inc.?

A One.

Q Who would that be?

A Thomas McNamara.

Q Now, in April of 1973, did you have occasion to appear in the grand jury?

A Yes, I did.

Q On how many occasions?

A Once, I think possibly twice because I came into your office twice. Now I forget if I went up to the grand jury twice, I think it was once to the grand jury. I think you had me in there some other time and asked me some questions, but I could be, you know, wrong on that, that is going back.

Q Well, you wouldn't remember the exact date, would you?

A No.

Q I will show you Government's Exhibit 3500-32 and Government's Exhibit --

MR. GILLEN: We will concede the dates, whatever they are.

THE COURT: Maybe that will help.

(Two documents were handed to the witness.)

A Then I was there twice on on the 18th and the

11th.

Q Of April?

A Right.

Q When you appeared in the grand jury, by whom if anyone were you accompanied?

THE COURT: No.

When you came to Mr. Ritchie's office for the purpose of appearing before the grand jury, if he asked you to, were you accompanied by anybody?

THE WITNESS: In the first instance I was accompanied by a Mr. Ray Bergen, on the second instance I was accompanied by Tim Shea.

Q And Mr. Bergen was an attorney for Thomas McNamara, is that correct?

A Yes.

Q They accompanied you to this building; is that correct?

A To your office, which I think is in the annex.

Q When you went into the grand jury yourself, you were unaccompanied of course; is that correct?

A That's correct.

Q Now when you went into the grand jury, were you appearing pursuant to a subpoena?

A Yes, sir.

Q I show you what has been marked as Government's Exhibit 26 for identification and I ask you if that is the subpoena you were appearing pursuant to?

A It appears it is.

MR. RITCHIE: Your Honor, I offer that in evidence.

THE COURT: Is that 26?

MR. RITCHIE: Yes, your Honor.

MR. GILLEN: No objection, your Honor.

THE COURT: Received.

THE CLERK: So marked as Government's Exhibit 26 in evidence.

BY MR. RITCHIE:

Q Now, with respect to 26 now in evidence, to whom is that subpoena directed?

A "Custodian of records of McNamara Re: New Cars, Inc."

Q Mr. Sini, when if ever did you become a custodian of records of McNamara Re: New Cars, Inc.?

A At the time I was handed this document and it was decided by the lawyers that someone would have to take them in, they asked if I would go in.

Q Well, was it at the time that you were

handed the document or at a later time when you had a discussion with other individuals that you became the custodian of records?

A Well, I really don't understand what you are asking.

Q That subpoena --

THE COURT: When did you first have actual physical custody of any of the records of McNamara Re: New Cars, Inc.?

THE WITNESS: The day that I came in for the grand jury hearing would be the day that I had them, you know, in my hands.

THE COURT: Actually?

THE WITNESS: Actually had them in my hands.

BY MR. RITCHIE:

Q When did you receive that subpoena?

A I can only assume that it is the date that is on it, that would be April 4, '73.

Q That is the date for --

MR. GILLEN: We will stipulate whatever the date of service was the date.

MR. RITCHIE: March 29th.

THE WITNESS: Okay, I see.

MR. RITCHIE: So stipulated?

MR. GILLEN: Yes, so stipulated.

BY MR. RITCHIE:

Q Now were you in custody of the records listed in that subpoena on March 29, 1973?

A No.

MR. RITCHIE: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. GILLEN:

Q Who did have custody of those records, do you know, Mr. Sini?

A I would say Thomas McNamara did.

Q Anybody else?

A Well, they were his, I mean if -- no, I would say that nobody got any information out of them, I could ask him if I could look through them.

Q What about Charles Sherman?

A Well, he was the individual who set up our records, he had died in August of '72 and up to that time I would say that he would be the custodian of records. After that point the job was pretty much done and they were dormant from that period up until the time that the grand jury hearings started.

Q Now, on March 29 Charles Sherman was still

alive; is that right?

THE COURT: Of '73?

MR. GILLEN: Of '72.

A Of '72, yes.

MR. GILLEN: I mean '73, I am sorry.

THE COURT: Let us get it straight now, with particular reference to the year when was it that Mr. Sherman died?

THE WITNESS: Sherman died --

MR. GILLEN: On March 29, 1973?

THE WITNESS: He was dead.

THE COURT: He was already dead having died?

THE WITNESS: August 30 is about the time of '72.

THE COURT: That is before the move to the new site?

THE WITNESS: No, no, he died about the second or third day at the new site.

MR. GILLEN: Excuse me.

THE COURT: All right.

THE WITNESS: Maybe I have got the years mixed up.

He pased away the second or third day we moved up to the new site, that would be '72 --

or '71 -- '72.

MR. GILLEN: '72.

THE COURT: I think the jury and I think it is '72.

(Continued next page.)

Sini-cross

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BY MR. GILLEN:

Q If I stated to you he died in the year 1973, would you accept that?

MR. RITCHIE: Objection, your Honor, Mr.Gillen is testifying.

MR. GILLEN: I can call him, I can call him.

A He died in the year '72, I am pretty sure.

Q Was there ever a discussion as to who would bring these records in to Mr. Ritchie's office and to the Grand Jury?

A Yes, Tim Shea met me with Thomas McNamara and--

Q Was Mr. Sherman's name mentioned in connection with any discussion as to who would physically come in to Brooklyn with these records?

A Yes, well, someone asked who Mr. Sherman was and I think it was Mr. Bergen because I met him and we indicated --

MR. RITCHIE: I object to the conversation.

THE COURT: It is just to straighten out this death problem.

A (continuing) and he indicated, or I indicated that he had been the chief bookkeeper or the keeper of records but that he had passed away, and so then they said, Who would be the next likely individual to handle it?

Sini-cross

I said it would be myself or a Mrs. Helen Samuels who was the bookkeeper for Tom, all the three of us had done some bookkeeping in the books, and it was decided that I would bring it in seeing how Helen had kids and it was hard for her to come in and she didn't know any more about them than I did.

Q Was it a cold day, if you recall, back in April?

MR. RITCHIE: Objection on the grounds of relevancy.

Q Was it cold during that period of time, if you know?

A This is '73?

Q Yes.

A Yes, very cold.

Q Now, do you know what the phrase, "custodian of records" means?

A No, I never heard of it, to be honest with you, and I have asked two or three times what they mean by it.

If you talk about bookkeeper, you know, I can understand, you know, that term, but this term I haven't heard.

Q Isn't the accountant or bookkeeper usually the one who keeps the books and records?

Sini-cross

A Right.

THE COURT: Who makes the entries in the books and records.

THE WITNESS: That is the bookkeeper.

THE COURT: What?

THE WITNESS: That is a bookkeeper.

THE COURT: Yes.

MR. GILLEN: May I have this marked for identification, please?

THE CLERK: Yes.

Marked for identification as Defendant McNamara's Exhibit AZ.

BY MR. GILLEN:

Q I show you Defendant McNamara's --

THE COURT: Do you want to show it to Mr. Ritchie, please.

MR. GILLEN: Sure.

Q I show you Defendant McNamara's Exhibit AZ for identification.

Have you ever seen these documents before, Mr. Sini?

A Yes, I have.

Q And did you see those documents in the course of your employment with McNamara Buick-Pontiac?

Sini-cross

A Yes.

Q And did you see those documents on the premises of McNamara Buick-Pontiac?

A Yes.

MR. GILLEN: I offer that in evidence, your Honor.

MR. RITCHIE: Objection, your Honor, this has been absolutely not authenticated.

THE COURT: May I see it?

(Document handed to the Court.)

(continued on next page)

4

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(The following took place at side-bar.)

THE COURT: What is it about?

MR. GILLEN: It is a check that was cashed, $20,000, on the morning of June 28th, 1972, put together with another $500 that was tendered during the meeting. Tendered to Mr. Goberman.

Here is the proof (indicating).

THE COURT: Unless it's accepted that Thomas McNamara drew a check --

MR. RITCHIE: Your Honor --

MR. GILLEN: There is an error on here.

MR. RITCHIE: I don't doubt there is an error. That money was redeposited.

THE COURT: James McNamara endorsed it.

MR. RITCHIE: This is not a regular business record. It hasn't been proved as such.

THE COURT: We are not going to stand around after two weeks spent on a one week case to force them to come in here in order to admit this is one of their records.

MR. RITCHIE: My objection is to introduce this into evidence on no authentication is denying the Government a right to cross-examination. I believe it does. That is a very powerful document but absolutely means nothing, there has been no

establishment of relevancy -

THE COURT: That is a separate thing.

MR. RITCHIE: That is my other objection.

THE COURT: That is your real objection.

MR. GILLEN: I intend to reduce --

THE COURT: At any time Mr. Thomas McNamara wants to take the witness stand, he is welcome to do it. He is not going to get this in through Sini.

MR. GILLEN: There is one thing here, Mr. Ritchie had a conversation with this witness where this witness told him about a $25,000 entry into the books and records. Nobody made a report of that or thought it was important enough.

MR. RITCHIE: That is not correct. That was two weeks ago in a car outside McNamara Buick-Pontiac. It is absolutely not a Brady question. It is my understanding I am not under any reporting requirement --

THE COURT: You certainly are under Brady.

MR. RITCHIE: I would be under Brady but it is absolutely incredible that Mr. Gillen is saying I am suppressing evidence when it was sent out.

MR. GILLEN: Was there any --

THE COURT: Sent out what?

MR. RITCHIE: It was sent out to my car two

weeks ago.

THE COURT: To give you this (indicating)?

MR. RITCHIE: No, the interview --

MR. GILLEN: At your request.

MR. RITCHIE: At my request, absolutely.

THE COURT: He told you about this?

MR. RITCHIE: He was asked about that, yes.

THE COURT: I take it he immediately told Mr. McNamara about having told it, but there is no impropriety at all.

MR. GILLEN: I disagree.

THE COURT: I don't care whether you do or not, let's move on with this. This does not belong in the cross-examination of Mr. Sini. He knows nothing about the agreement. Was he present at this interview? No.

MR. GILLEN: Were the Government officials who did not choose to write a report?

THE COURT: Theywere not present at the time of the tender.

MR. GILLEN: Nobody said they were.

THE COURT: This isn't the Kyle case, the trial is going on. You have the information and the Government hasn't rested.

MR. GILLEN: The Government had no intention

of giving me this information.

MR. RITCHIE: I believe I was asked by Mr. Gillen yesterday indicating he was aware --

MR. GILLEN: I asked if there was a report.

THE COURT: Sini had reported it to him.

MR. GILLEN: I respectfully disagree with your Honor.

THE COURT: YOu don't have to do it respectfully.

MR. GILLEN: I do have respect for your Honor.

(The following took place in open Court.)

MR. GILLEN: I press my offer, sir.

THE COURT: Excluded.

CROSS-EXAMINATION

BY MR. GILLEN: (Cont.)

Q Mr. Sini, did Thomas McNamara ever inform you of any threats made to him by Harry Goberman?

MR. RITCHIE: Objection, your Honor.

THE COURT: Overruled.

A I can answer?

THE COURT: Yes.

A Yes.

Q When?

A One instance when I was up doing --

5 Sini-cross/Gillen

THE COURT: I think he means what year.

A It would have been the spring of '72.

THE COURT: '72?

A '72.

THE COURT: A full year before the grand jury?

THE WITNESS: Right. He indicated to me that there was one argument on the roof of the new building. He didn't go into great detail about it. I think this was the time that the roof was being put on. And that hewas unsatisfied with the rating, and Thomas McNamara indicated that Harry and him had gotten into an argument and Harry told him that if he didn't come around he was going to throw him off.

Q Throw him off what?

A Of f the building.

Q Off of the roof or off of the building or off of the job?

A Off the roof. He was going to throw him off. Also, this would be after the building was done. It is pretty hard to give the time sequence here. We had gotten a couple of phone calls from his wife Ellen.

THE COURT: Is that Helen?

THE WITNESS: No, Ellen.

Q Ellen McNamara?

A Ellen McNamara had called up Tom and indicated that there was someone on their property and she couldn't see him. I recall it either had to be in the spring or fall because it was a misty day. That I do recall. And she couldn't see who it was. And asked Tom if he would call up the police which he did do. This happened twice.

MR. RITCHIE: I move to strike everything after the testimony concerning the threat on the roof. There is absolutely no connection to anything in this case in regard to that alleged threat. A nameless person? It is double hearsay.

A No, because I was in the office --

THE COURT: Just a moment.

MR. RITCHIE: After the building was completed, I move to strike.

THE COURT: No, it is stricken as not related to this episode.

Q Did you finish your answer? You were starting to say you were in the office --

THE COURT: No, he was talking about the relationship to the testimony just stricken.

MR. GILLEN: I have nothing further.

THE COURT: I believe you were.

THE WITNESS: Yes.

7 Sini

MR. GILLEN: Nothing further.

MR. RITCHIE: May I have some cross?

MR. GILLEN: Cross?

THE COURT: I think it would be redirect.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Didn't I interview you a little more than two weeks ago?

A Yes.

Q At that time --

MR. GILLEN: Your Honor, I object. This is what we discussed at side-bar, and now he wants to go into it.

THE COURT: May I hear the question?

(Whereupon, the last question was read by the reporter.)

Q At the time were you asked to relate to the Government any threats that you were aware of which came from Harry Goberman?

MR. GILLEN: I must respectfully object because of the side-bar we had. Everything else that was said at that side-bar --

THE COURT: No, that didn't touch on this topic at all.

MR. GILLEN: This is the very interview we were talking about.

THE COURT: Not on this topic, sir.

Who was present?

THE WITNESS: Dick McMullen, and your assistant, I don't recall her name.

BY MR. RITCHIE:

Q That is Marsha Katz, another Special Attorney with the Department of Justice.

A Yes.

Q I interviewed you, right?

A Yes.

Q Where was that interview conducted?

A In your automobile.

Q Where was that automobile parked?

A At McNamara Buick-Pontiac.

Q At that time were you asked to relate to the Government any threats that you were aware of, allegedly made of Harry Goberman?

A Yes.

Q At the time did you relate --

THE COURT: What if anything did you say?

MR. RITCHIE: Yes, your Honor.

Q What if anything did you say?

9 Sini-redirect

A I indicated the two phone calls to Ellen McNamara and I said at that time I could not recall any other threats.

MR. GILLEN: He is adducing the same thing he moved to strike.

THE COURT: He has to answer the questions honestly.

MR. GILLEN: I am not saying anything towards Mr. Sini, I mean --

THE COURT: It will be stricken on the same reason, it relates to a much later period and not connected with this matter we are directly concerned with here, as far as it relates to Mrs. Ellen McNamara's telephone report of the mist and the men.

Q Forgetting about any conversation about Ellen McNamara --

THE COURT: He has said that is all that he recalled at that time.

Q Now -- I have no further questions.

A I think there was one other thing.

Q Could you relate that?

A One other thing you had asked me. You were trying to find out if Tom was worried about anything. You asked me if there was any kind of threat. And at that point

I did not recall the roof incident but I told you about somebody driving up one day also.

Q What individual drove up?

A I said that I didn't know the individual's name but that an individual drove up and Harry got in the automobile with the individual and I indicated to you that Tom pointed out to me he told me that was somebody in the mob. And Tom was worried about it. That was the other instance I indicated to you.

Q Those were the two threats by Harry Goberman that you related to the Government just two weeks ago, is that correct?

A Yes.

Q Did you make any mention whatsoever of that conversation between Thomas McNamara and yourself regarding the roof incident?

A No.

MR. RITCHIE: I have no further questions.

MR. GILLEN: May I have the report of this alleged interview?

MR. RITCHIE: Mr. Gillen was already informed--

THE COURT: Just a moment.

MR. RITCHIE: Your Honor, the Government has no report of such interview.

11 Sini

THE COURT: Was there any report?

MR. RITCHIE: There was no --

THE COURT: Was there, Mr. McMullen?

MR. MC MULLEN: No.

RECROSS-EXAMINATION

BY MR. GILLEN:

Q Are you sure Mr. McMullen was also there?

A Yes.

Q How long did the conversation take?

A 45 minutes.

Q Was anybody taking any notes?

A (No response.)

Q Was Mr. McMullen taking notes?

A I can't answer if he was taking notes. He was in the front seat in the automobile, I couldn't tell. I think Mr. Ritchie had some paper but I can't indicate he was taking notes.

Q Anybody else there other than Mr. Ritchie and --

A And his assistant.

Q The young lady here (indicating)?

A Yes.

Q Was she taking any notes?

A I don't think so.

MR. GILLEN: I call upon the Government as to

12 Sini-recross

whether or not any notes were taken of this interview.

MR. RITCHIE: Your Honor, Mr. McMullen states he may have.

Does your Honor wish this in front of the jury or at side-bar?

THE COURT: Well, all right. Come up.

(Continued next page.)

an:2

MP:BD
5-2

Sini-recross

(The following took place at side bar.)

MR. RITCHIE: Mr.McMullen states that a 3 by 5 card on that date -- well, he wrote down John Sini's name and address and telephone number in relation to a subpoena. The name and telephone number.

MR. GILLEN: Mr. McMullen also testified in his investigation nobody verified any threats.

THE COURT: Nobody what?

MR. RITCHIE: Nobody did. That is not a threat. Neither were those two instances related to the Government were threats.

THE COURT: It is whatever it is.

MR. FISCHETTI: May I register a general objection. This is something I've never seen before, in which the prosecutor, the United States attorney, is allowed to ask the witness and not having a note of it. How can he possibly --

THE COURT: The man is under oath.

MR. FISCHETTI: He has the agent there and an assistant there and he deliberately does not take a note so we don't get 3500 material. And then when he examines he says didn't I ask you this and didn't I ask you that and didn't you tell me

this and didn't you tell me that. That is unfair.

THE COURT: That is what 3500 --

MR. RITCHIE: The interview of John Sini was memorialized -- he said I interviewed for 45 minutes and I don't think it was that long --

THE COURT: He said it was 45 minutes and he is your witness. His candor seems complete.

MR. RITCHIE: I am not doubting it.

MR. GILLEN: You seem to be.

MR. RITCHIE: I had a point to make on inconsistency and I made it. I am not doubting his candor.

MR. MEISELMAN: It puts us in a very pejudicial position. The United States attorney is saying to a witness, did I not say to you --

MR. FISCHETTI: Just a second. I ask for an instruction on 3500 material to inform the jury that while a witness is interviewed by an agent there should be --

THE COURT: 3500 says no such thing.

MR. FISCHETTI: As I understand it it says when a prosecutor calls a witness, any material that they have memorialized by writing related to the direct testimony --

THE COURT: They don't have to put it in if they don't want to, any more than defense counsel do.

(The following took place in open court.)

MR. GILLEN: Nothing further.

MR. RITCHIE: May I just have this marked for identification?

THE CLERK: Marked for identification as Government's Exhibit 27.

THE COURT: These are Mr. McMullen's notes of the interview?

MR. GILLEN: I offer it in evidence.

MR. RITCHIE: I join in Mr. Gillen's request to offer it in evidence.

THE CLERK: Government's Exhibit 27 now marked McNamara --

MR. GILLEN: May I read it to the jury?

MR. RITCHIE: May I read it?

THE COURT: Either one.

MR. RITCHIE: Wait. I have no further questions.

MR. GILLEN: Defendant McNamara's exhibit BA in evidence reads "Allen Gniazdowski, 941-3753, home, John Sini, 751-2116."

Sini-recross

MR. FISCHETTI: May we have a stipulation those are Mr. McMullen's notes?

MR. RITCHIE: I will so stipulate that during the course of that --

THE COURT: All right, it is stipulated that those are the notes of Mr. McMullen made at the time of the interview to which Mr. Sini has referred.

MR. GILLEN: No further questions.

MR. LEONE: No questions.

THE COURT: You are excused, Mr. Sini.

MS. KATZ: The Government calls Sandra DiNunzio.

S A N D R A D I N U N Z I O , a witness called on behalf of the United States of America was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MS. KATZ:

Q Mrs. DiNunzio, whom are you employed by?

A I am employed by Gonnigill, Killian, Johnson and Shea, in Port Jefferson.

Q What do you do for Gonnigill, Killian, Johnson and Shea?

A I am Mr. Shea's legal secretary.

Q How long have you been employed by Mr. Shea and the firm?

A Approximately three and a half years.

Q Were you so employed on June 28, 1972?

A Yes, I was.

Q Was DiNunzio your last name in June of 1972?

A No.

Q What was your last name at that time?

A Bazell.

Q I show you Government's Exhibit 16 and ask if you recognize it?

A Yes, I recognize it.

Q Directing your attention to page 4 of this exhibit, I ask if that is your notarization?

A Yes.

Q Whose signature were you notarizing?

A I notarized Mr. Thomas McNamara's signature.

Q Did you actually see Mr. McNamara sign his name?

A Yes.

Q What was the date the document was signed?

Q It's dated June 28, 1972.

Q Who if anyone else was present at the time

of the signing?

A I am afraid I don't remember that.

Q After the document was notarized, did you retain a copy of the papers?

A After it was notarized, no.

Q Prior to the notarization had you ever seen this document before?

A Yes.

Q Can you tell this Court when?

A Yes, I prepared the document on June 6th. I should say I typed the document on June 6th.

Q On June 6, this was 1972?

A Yes.

Q Did you retain acopy of the document for your office files?

A Yes.

Q This is the standard office procedure?

A Yes.

Q When was the last time you saw the office copy of this document?

A On June 6.

Q Do you know if this document still is in your office file?

A I don't know. I haven't been able to find

it.

Q Have you looked for this document?

A Yes, I have.

Q You have not found it in the file?

A No.

Q Do you know whether Gonnigil, Killian, Johnson and Shea represent McNamara Re: New Cars, Inc. or ever represented them?

A Yes.

Q Do you know if the law firm represents or has ever represented McNamara Buick Pontiac?

A Yes.

MR. MEISELMAN: Objection, if your Honor please.

THE COURT: On what ground, sir?

MR. MEISELMAN: I don't see the relevancy.

THE COURT: Overruled.

MR. MEISELMAN: Secondly, I don't think this young lady is capable of characterizing a relationship of counsel and client and may not be privy --

THE COURT: She is privy, and the jury will take that into account.

Q Do you know if your office maintained any files concerning either McNamara Buick Pontiac or McNamra

Re: New Cars, Inc.?

A Yes.

Q Did these figures contain copies of legal work done for McNamara Buick Pontiac and or McNamara Re: New Cars Inc.?

A Yes.

Q Who would have access to those two particular files?

A What two files?

Q The files of either McNamara Buick Pontiac or McNamara Re: New Cars Inc?

A There might be more than one.

Q Any or all of the files you --

A Mr. Shea, myself, the lawyers in the firm.

Q Did you at any time subsequent to June 6th remove the document, Exhibit #16, from either of these two files?

A No.

Q Do you know who if anyone may have removed the documents from the office files?

A No, I have no idea.

MS. KATZ: The Government has no further questions.

MR. GILLEN: Miss Witness, what is your

phone number?

I have nothing further.

MR. LEONE: Question withdrawn.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Mrs. DiNunzio, have you ever been interviewed by the Government?

MR. GILLEN: Objection. There is no question.

THE COURT: There is no occasion for the question.

MR. RITCHIE: Yes, your Honor. The Government has no further questions.

MR. LEONE: No questions.

THE COURT: You may step down, Mrs. DiNunzio.

MR. RITCHIE: The next Government witness will be --

THE COURT: Well, lunch first? We will recess until five minutes to 2:00. Please do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

(A recess was taken at this time until 1:55 p.m.)

EK:j
lpmR

AFTERNOON SESSION

(The jury took its place in the jury box.)

MR. RITCHIE: The Government calls as its next witness Mr. James Pavese.

JAMES V. PAVESE, called as a witness on behalf of the Government, having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q You are a detective, are you not?

A Sir?

Q You are a detective, are you not?

A Yes, I am.

Q With what police force?

A Suffolk County, New York.

Q And what is your unit?

A Now I work in the District Attorney's Office.

Q Where were you working in June of 1972?

A Criminal Intelligence Division, Suffolk County Police Department.

Q And how long have you been a detective?

A Thirteen years.

Q Now, directing your attention to June 28,1972, did you have occasion to see a Harold Goberman on that date?

A Yes, sir, I did.

Q Where did you first see him?

A I observed Harold Goberman coming out of a business establishment in Port Jefferson, New York.

Q What particular business establishment was that?

A McNamara Buick.

Q And where was McNamara Buick located at that time?

A In Port Jefferson Village, down by the harbor.

Q Was that at the intersection of 25A and Main Street?

A Yes, it is.

Q Now, what, if anything, was Harold Goberman doing at the time that he exited those business premises?

A He had left the structure and stepped off the curb into a waiting cab.

Q Can you describe the cab?

A Yes, sir, I can.

It was a dark colored automobile and there was a white man driving it and there was a dome light affixed to the top, it said "taxi" on it, it was yellowish-orange in color.

Q And in what direction was that vehicle headed?

A Facing east.

Q Now, where did that cab go after Mr. Harold Goberman went in it?

A After Goberman entered the cab, it turned around and proceeded westbound on Route 25A towards Smithtown, New York.

Q Now, where did the automobile -- where did that cab stop?

A At the Pioneer Diner, located at Route 111 and Smithtown By-Pass in Hauppague, New York.

Q Did you follow that cab all the way?

A I did, sir.

Q And when the cab arrived at the Pioneer Diner, what, if anything, did you observe Mr. Goberman do?

A Goberman exited the cab and entered the diner. He came out immediately with a pack of cigarettes in his hand, unwrapped them and went to his automobile, got in the automobile --

Q Did he get into his automobile and start it up?

A Sir?

Q Did he get into his automobile and start it up?

A He did.

Q And where, if anywhere, did he proceed from there?

A He exited the parking lot and proceeded eastbound on Route -- I don't recall the route now, it is also known as the Smithtown By-Pass, and went in an easterly direction.

Q That would be on Route 347?

A Yes.

Q And did there come a time when that car stopped?

A It did, sir.

Q And what, if anything, happened at that time?

A Goberman made a right-hand turn on to Plastered Avenue, I believe, running in a southerly direction off of the By-Pass, and we followed again. "We" is my partner and myself.

Q Who is your partner?

A Joseph Isola, who also at that time was a detective in the Criminal Intelligence Division.

We pursued the automobile approximately a quarter a mile and pulled him over.

Q And when you pulled him over, what, if anything, happened?

A We identified ourselves to him and I asked him for his license and registration.

He asked what was wrong and we again -- I

again asked him for his license and registration.

Q Did he produce the license?

A He did, sir.

Q And was the license in the name you knew him by?

A No, sir, it was not.

Q There was another name?

A Yes, it was.

Q What was the other name?

A Harry Masterson.

Q After seeing the license, what, if anything, did you do then?

A I asked Mr. Goberman, who I had known personally --

Q You knew him through law enforcement activities, is that not correct?

A Yes, that being the case.

Whether or not it was his license that he had, and he said, yes, it was.

I said, "Well, why is the name Masterson on it?"

He in turn said, well, he is known by two names, Goberman and he uses Masterson.

"Do you have anything to substantiate that?"

He said, "Well, I have had a change in the card," and I said, "Do you have any documents reflecting that for the court of jurisdiction on it?"

He said, no, not with him.

Q Did you then arrest him?

A After further examination of the license, which I may add was obliterated in part, it was of the old style, not of the new style as we have today, it was questionable, I said, "Do you have a license?"

"That is my license."

I said, "Well, until we find out, you are under arrest now."

Q Did you write a ticket in connection with this?

A I did, sir.

MR. RITCHIE: Would you mark this two-page document?

THE CLERK: Government's Exhibit 28 for identification.

BY MR. RITCHIE:

Q I show you what has been marked as Government's Exhibit 28 for identification and I ask you if you recognize that document?

A Yes, I do.

Q What is it?

A It is a uniform traffic ticket issued by the State of New York.

Q Is that the original?

A No, sir, it is not.

Q It is a copy, it is a photostatic copy of the front and back of that ticket; is it not?

A Yes, sir, it is.

Q And if you know, where is the original?

A That has been processed through the courts, sir, and it is retained by the court.

Q It is retained by the Suffolk County Court?

A Courts, and eventually it ends up back in the Department of Motor Vehicles.

MR. RITCHIE: Your Honor, I offer this in evidence.

MR. GILLEN: May I just have a short voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. GILLEN:

Q Detective Pavese, was this ticket written at the stationhouse?

A Yes, sir, it was.

Q I see.

And was it written, was it given to Mr. Goberman before he left the station?

A Yes, sir, it was.

Q Was it given to him just before he left the stationhouse?

A I don't recall, but it was given to him by myself.

MR. GILLEN: I have no objection.

THE COURT: Received.

THE CLERK: Government's Exhibit 28 in evidence.

DIRECT EXAMINATION

BY MR. RITCHIE (continued):

Q Now, do you recall -- well, I will hold this for a while -- do you recall the specific type of vehicle that was being driven at that time?

A I believe it was a '72 Cadillac.

Q Would that refresh your recollection as to the year of the car?

MR. GILLEN: Your Honor, it is in evidence.

A Yes, sir.

Q And what year is that?

A It is a '71 Cadillac.

Q And what is the time indicated on that uniform traffic ticket?

A 11:30.

Q When did you first observe Mr. Goberman on that date?

A When did I first observe him?

Q Yes.

A At Port Jefferson, New York.

THE COURT: At what time, with reference to this?

THE WITNESS: About eleven o'clock, five to eleven, eleven o'clock.

(continued on next page)

BY MR. RITCHIE:

Q And whast does that 1130 indicate, what particular event does that denote the time of?

A That would be the time I made out -- let me correct that; that would be the time that we stopped in for the arrest of the viclation of driving in New York State without a license.

Q Now, directing your attention to the time that you stopped him after you asked him for his license, did you then proceed to search his automobile?

A His person and the automobile, yes, sir.

Q And what was your purpose in so doing?

A Well, it was first for the purpose of finding out whether or not he possessed a weapon, and after that was established and then his automobile was searched by myself and my partner.

Q Now, is that routine procedure?

A It is, sir.

Q After you had -- during the course of this search of the automobile, did you discover any money in the automobile?

A No, sir, I did not.

Q Did you discover any weapons in the automobile?

A No.

Q Did you search his person?

A I did.

Q And how much money did you find on his person?

A I don't recall the exact amount, I know he did have currency on him but I don't recall the amount.

Q You were interviewed back in October 1972 by Special Agent McMullen; were you not, sir?

A I was, sir.

Q And you were asked about this incident; were you not, sir?

A I was, yes, sir.

Q I show you what has been marked as Government's Exhibit 35-26 and I direct your attention to the third paragraph thereof.

I would ask you if that refreshes your recollection as to the amount of money discovered or found on Harold Goverman's person.

A Yes, sir, it does now.

Q And how much money was that?

A $200, sir.

Q Now, after searching the vehicle, what if anything, did you do next?

A We made his vehicle secure at the side of the road, that being Plastered Avenue, Hauppauge, New York.

Q Can you spell that, just for the benefit of the record?

A Plastered.

Q And where, if anywhere, did you go from there?

A We locked the automobile up and we maintained the keys and conveyed, put him into the detention unit and conveyed him to the Central Detective Headquarters.

Q And at what time did you arrive at the Detective Headquarters, the approximate time?

A A quarter to twelve, maybe earlier.

Q Now, you arrived at the parking lot; did you not?

A Yes, sir.

Q And from there you proceeded on foot into the building?

A That is correct.

Q And while proceeding to the building, did you have occasion to observe Mr. Goberman's method of walking?

A Yes, sir.

Q How was he walking?

A I was in front of him walking, my partner was assisting him up the sidewalk, in fact he was handcuffed, due to the fact, and he made mention of his leg hurting and that called my attention and I turned around andjust

looked at him and his body movements reflected that something was wrong with his leg, but he said nothing further.

Q And how long was he in the Detective Headquarters after a quarter of twelve?

A To my best recollection, 40, 50 minutes.

MR. RITCHIE: I have no further questions, your Honor.

CROSS-EXAMINATION BY

MR. MEISELMAN:

Q Officer, I don't recall your testimony, but were you asked how long you had been a detective?

A 13 years, sir.

Q In the course of that period of time, did he person known as Harold Goberman come to your attention?

A Yes, sir, he did.

Q Approximately how long ago prior to 1972 when you stopped in June?

A 1956, 57, 58, 59.

Q Excuse me for being discourteous, my name is Lawrence Meiselman, I am co-counsel with Mr. Gillen for Thomas McNamara.

A Yes, sir.

Q Was he known to you to be a person who went under --

A I am sorry --

MR. RITCHIE: Objection.

THE COURT: Objection sustained.

Q Was he known to carry a gun?

A Yes, sir, he was.

Q Now, I believe you testified that you arrived in Port Jefferson Station on Main Street sometime in the morning of June 5 and went near or were at the Main Street office of McNamara Buick --

A June 5th?

THE COURT: I think it was June 28 that this witness testified about.

MR. MEISELMAN: I am sorry, your Honor, I am starting to get confused.

Q June 28th, I beg your pardon.

A Yes, sir.

(Contd on next page.)

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Q Can you tell us, sir, approximately what time you got there?

A Five to eleven, 11 O'clock. It may have been 5 after.

Q Did you go there sir, as part of a routine matter on your own or did you go there pursuant to the orders of any of your superiors?

A Our purpose in going there was in locating -- of going there was to locate Harry Goberman.

Q Your superior had asked you to do so?

A Told me to do so, yes.

Q And had your superior advised you that -- who was that?

A At that time it was Detective Sergeant Robert Crayton.

MR. RITCHIE: I would object to any questions concerning advice from his superior.

THE COURT: Overruled.

Q Did Detective Sergeant Crayton advise you that they had received you that they had received a telephone call from a McNamara asking for the police?

A No, he did not.

Q What were your specific orders, if you remember?

A I was out on another matter. I was contacted. I do not recall by radio or I was talking to somebody at a given time prior to the incident.

Subsequently I called back the office, he advised me "Get out and pick up Goberman. You know some of his old addresses. You know who he is and where he hangs out. Pick him up and see what he is doing."

THE COURT: See what?

THE WITNESS: See what he is doing.

Q When you first stopped -- withdrawn.

When you first observed Mr. Goberman coming out of his building, was he limping?

A I couldn't see that, sir.

Q When you first saw him going into the Pioneer Diner, was he limping?

A I don't recall.

Q When you saw him coming out of the Pioneer Diner, was he limping?

A I don't recall that either.

Q Did there come a time when entering Police Headquarters, he stumbled?

A He made mention that his leg had hurt.

Q Did he stumble?

A I didn't see him, sir.

Q I show you what has been marked, I believe, as 3500-35 --

MR. RITCHIE: That is 26.

Q 26.

I ask you, sir, to look at the last paragraph and see whether it refreshes your recollection.

(Document shown to witness.)

A Now it does, yes.

Q Now that your recollection is refreshed, Officer, did there come a time when Mr. Goberman stumbled on his way to Police Headquarters?

A Sir, again my attention was drawn to it by words and the words stimulated my turning around and I did see the motion of his leg -- his favoring it.

Q Did he stumble, Officer?

A He favored his leg, sir.

Q Did you at anytime up until that time see him limp or hear any complaints from him about pain or limping?

A Not prior.

Q Did you have occasion to observe Mr. Goberman's face?

A I did, sir.

Q Did you see any marks or bruises?

A I don't recall, sir.

Q If you would have seen them, would you have made a note of it?

A Yes, sir.

Q Did you have occasion, Officer, to observe Mr. Goberman's clothes?

A I did, sir.

Q Were they in anyway in disarray or torn or ripped?

A I made no observation of it, no.

Q If you would have seen it, you would have made a note of it?

A Yes, sir.

Q Do you have any such notes?

A No sir, I do not.

Q Did Mr. Goberman tell you anything about any injury?

A No sir, he did not.

Q Did he make any complaints to you about the fact that he had been beaten or had suffered injuries?

A No sir, he did not.

Q And at that time he was cuffed behind his back?

A He was.

Q Anything said to you by Mr. Goberman about a

gun?

A No sir, there was nothing.

Q Approximately how far was Plastered -- am I pronouncing it correctly?

A Plastered.

Many people make the mistake.

Q The street where you stopped him, how far is that from Central Headquarters?

A Two and a half miles, approximately.

Q And Central Headquarters, that is of the Hauppauge Police --

A Suffolk County Police.

Q Pardon me, is in Hauppauge on Veterans Highway?

A It is a hamlet within the town of Smithtown in Islip.

Q It is known as the area of Hauppauge?

A Correct, sir.

Q Did you follow this summons through to conclusion, Officer?

MR. RITCHIE: Objection, irrelevant.

THE COURT: Overruled.

The question is whether you were in on the follow-up to this arrest.

THE WITNESS: No sir, it was a normal process of submitting this summons to the court and until notified, wouldn't see it again.

Q Were you notified to appear in court concerning the same?

A No, sir.

Q Did you ever appear in court concerning the same?

A No, sir.

Q And you have no idea or conception of what ever happened to that summons since?

A No, sir.

Q Did Harold Goberman have a special status with the Suffolk County Police?

A I do not understand what you mean.

MR. RITCHIE: Objection.

THE COURT: A special what?

MR. MEISELMAN: Status.

THE WITNESS: In what respect, counsel?

THE COURT: Was he a paid informer or any kind of informer?

Is that what you mean?

MR. MEISELMAN: In effect, yes.

THE WITNESS: I have no personal knowledge of

Mr. Goberman ever being a paid informer. There have been times that he may have made information available to the police, yes.

MR. MEISELMAN: Thank you sir, no further questions.

MR. RITCHIE: I have one or two -- anybody else?

MR. FISCHETTI: No questions.

MR. LEONE: No questions.

MS. SELTZER: No questions.

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q You stated that you did not recall whether he was limping when he was going into the diner and out of the diner?

A Yes, sir.

Q When you say you do not recall, do you have any recollection whatsoever of his condition, whether it was normal or abnormal?

A As to my observations?

Q Yes.

A Prior the incident mentioned today, whether or not he had any injuries prior -- is that what you were referring to?

Q Yes.

A No sir, I don't.

Q Did Mr. Goberman stumble at anytime?

A Mr. Ritchie, in the way the question was phrased, "Did he stumble?" He made mention to it which made me turn around and I did see him stumble.

Q When he stumbled, did he fall on his face?

A No, sir.

Q Did he fall at all, did he land on the ground?

A No.

Q Did he land on his head?

A No.

Q Did he land on his forearm?

A No sir, he remained upright.

Q Did he fall on his shoulder?

A He remained upright.

MR. RITCHIE: I have no further questions.

MR. MEISELMAN: No questions.

MR. LEONE: No further questions.

THE COURT: You are excused, Officer.

THE WITNESS: Thank you.

MS. KATZ: The Government calls as its next witness George Koch.

G E O R G E W. K O C H, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Please state your full name?

THE WITNESS: Goerge W. Koch, K-o-c-h.

DIRECT EXAMINATION

BY MS. KATZ:

Q Mr. Koch, would you tell this Court what is your occupation?

A I am a banker.

Q What are your duties?

A Regional vice president, commercial lending officer for the Marine Midland Internaticnal Bank.

Q How long have you been employed by the Marine Midland International Bank?

A Approximately four years.

Q And in June of 1972, what were your duties?

A As they are now, commercial lending.

Q Do you know an individual named Thomas McNamara?

A Yes, I do.

Q Do you see him in the court room today?

A Yes.

MR. GILLEN: Conceded, your Honor.

Q Did you meet Mr. McNamara in a professional capacity?

A Yes, I did.

Q What was the nature of your dealings with the defendant Thomas McNamara?

A It was a financing of the construction and permanent mortgage lending of an automobile show room on Route 347 in Port Jefferson.

Q As the financing institution did Mr. McNamara apprised of the construction of the building?

A Yes, he did constantly.

Q And did there come a time in June of 1972 when Mr. McNamara informed you that he had terminated his contract with Harold Goberman who was the general contractor on the job?

A Yes.

Q And did Mr. McNamara ever inform you whether or not this was a mutually agreed upon determination?

A Yes, I believe he did.

MS. KATZ: I ask that this be marked for identification.

THE CLERK: Marked for identification as Government's Exhibit 29.

MR. GILLEN: Maybe we can stipulate to that

to save time.

THE COURT: Yes.

(Document shown to counsel.)

MR. GILLEN: We stipulate that it may go into evidence, if that is the Government's desire.

MS. KATZ: That is the Government's desire.

THE CLERK: Now Government's Exhibit 29 in evidence.

THE COURT: The letter and enclosure?

MR. GILLEN: Yes.

MS. KATZ: The two enclosures have already marked for identification, 16 and 17.

THE COURT: I think they may be in evidence.

MR. RITCHIE: Yes.

MS. KATZ: Yes, into evidence.

Q Now, did this document come into your possession?

A I do not know if it came directly by messenger or mail.

Q One of the documents is a letter; is that correct?

A Yes, it is.

Q Who sent that letter to you?

A It is signed by Thomas McNamara.

Q And what if anything accompanied this letter?

A Probably both of those came with it, I do not recall.

Q Did you ever receive a subpoena to produce any records in regard to this case?

A Yes, I did.

Q And what were you subpoenaed to produce -- were those the records?

A This was a very small part of it, all bank records relating to many, many accounts.

Q Was this document produced pursuant to a subpoena?

A Yes.

Q When did you produce these documents for the Government?

A It was sometime in May of 1972.

Q Was it pursuant to a Grand Jury appearance?

A It was prior to a Grand Jury appearance.

THE COURT: Do you have the year right?

Q May --

A 1973, I am sorry.

MS. KATZ: I would like to read the letter into evidence.

The stationery is headed "MaNamara Buick-

Pontiac, Inc., 102 Main Street, Telephone, in Port Jefferson, New YOrk, dated June 30, 1972.

"Mr. George Koch, Marine Midland International Bank, 180 East Main Street, Smithtown, New York 11787.

"Dear George:

"Please be advised that Mr. Harry Goberman, HarMac Construction Corp., has resigned under mutual agreement of cancellation of contract and release. enclosed please find a copy of this release. I was advised by Albert Karrins, chief building inspector, town of Brookhaven, to hire the original struc tural engineer, Louis T. Romeo, P.E., and architect Donald A. Becker, A.I.A., together they will supervise construction for the completion of the new McNamara Buick-Pontiac-Opel facilities.

"I hope this meets with your approval. Very truly yours," a signature "Thomas McNamara" and typed name "Thomas McNamara."

The bottom says "Enclosures."

The two enclosures were agreement of cancellation of contract release and a receipt signed by Harry Goberman for $25,000.

The Government has no further questions .

(Cont'd on next page.)

S:ss 2pm2

CROSS-EXAMINATION

BY MR. GILLEN:

Q Is that, Mr. Koch?

A Yes.

MR. GILLEN: May I have the exhibits?

(Documents handed to counsel.)

MR. GILLEN: Thank you.

Q How long have you known Thomas McNamara?

A Since sometime in 1970 -- late 1971 or early 1972.

Q Has he been a customer in your bank during that period of time?

A He became a customer subsequent to that. He had been on a very minor basis prior to that.

Q Did he have a number of accounts at your bank?

A Yes.

Q Do you know Timothy Shea?

A Yes.

Q How long have you known him?

A Since 1971.

Q Is Timothy Shea one of the attorneys for your bank?

A Yes, he is.

Q Have you got a personal relationship with Timothy Shea?

A Yes.

Q Do you know John McNamara?

A Yes.

Q Did he have accounts at the bank?

A Not when I met him, subsequently he brought his accounts to our bank also.

Q How about in or about 1973?

A By that time John McNamara did have accounts with us.

Q Did he have accounts with you before the service of this subpoena with these exhibits, 16, 17 and 29 were produced by the bank?

A Yes.

Q Did you have a personal relationship with John McNamara?

A Yes.

Q What about James McNamara, did you know him?

A Yes.

Q Did he have accounts at the bank?

A Yes, he did.

Q Did he have accounts at the bank prior to the subpoena and prior to the production of these records

by your bank?

A Yes.

Q Did you have a personal relationship with James McNamara?

A Not really. I knew him and had dealings with him.

Q Do you know Timothy McNamara?

A Yes.

Q Did he have accounts at the bank?

A Yes.

Q Did he have accounts at the bank prior to the bank producing these records?

A Yes.

Q Did you have a personal relationship with Timothy McNamara?

A Yes.

Q How about Kevin McNamara, did you know him?

A Yes, I did.

Q Did Kevin McNamara have accounts at the bank?

A Yes.

Q Did he have accounts at the bank prior to the time when these records were produced pursuant to the subpoena?

A Yes.

Q Did you have a personal relationship with Kevin McNamara?

A Sort of, yes.

Q How about Helen McNamara, do you know her?

A Yes, I do.

Q Did Helen McNamara have any accounts at the bank prior to the production of these papers?

A I don't know.

Q What about John -- Tom McNamara, Jr., did you know him?

A Not at that time.

Q Okay.

Did anybody ever ask you for the return of these documents before the subpoena was served?

A No.

Q Now, the letter from Thomas McNamara is dated June 30th, 1972; is that correct?

A Correct.

Q And at any time has Tom McNamara ever asked you for those papers back out of the bank records?

A No.

Q Has John McNamara asked you?

A No, he has not.

Q Has Kevin McNamara asked you?

A No.

Q Has Timothy McNamara asked you?

A No.

Q Has Timothy Shea asked you?

A No.

Q Did Timothy Shea ask if any such releases existed with you?

A No.

Q Did Helen McNamara ever ask you for those papers back?

A No.

Q Nobody ever asked you for those papers back?

A Correct.

Q And you had contacts with these people on a regular basis in and during the time that these records were produced and before the time these records were produced by subpoena; is that correct?

A Yes, it is.

Q Now, I show you exhibit AZ for identification. I ask you, sir, are they documents connected with the Tinker National Bank?

(Document shown to witness.)

A Yes, they are.

Q Now, is the white sheet of paper, is that a

copy of a document kept in the regular course of business by the Tinker National Bank?

A Yes, it is.

Q Is it the business of the Tinker National Bank to keep that type of document?

A Yes.

Q And do you presently in the files of the Tinker National Bank have a similar document?

A We have a photocopy --

Q That is a photocopy --

A I am sorry, we have it on microfilm. This is a photocopy.

MR. GILLEN: I would separate the exhibits, your Honor.

THE COURT: Just undo the staple. Do not tear it.

MR. GILLEN: All right.

(Document handed to Clerk.)

MR. GILLEN: May we have the document that has been taken from AZ marked as a separate exhibit, please?

THE COURT: AZ-1.

MR. GILLEN: Yes.

THE CLERK: So marked defendant McNamara's

exhibit AZ-1 for identification.

(So marked.)

BY MR. GILLEN:

Q Showing you AZ-1 for identification, I ask you is this a document connected with the Tinker National Bank?

A Yes, it is.

Q Would there be a -- what did you call it -- a microfilm of that document in the Tinker National Bank?

A Yes, there would be.

Q Is it the business of the Tinker National Bank to keep that type of document on microfilm?

A It is.

Q The microfilm of that document would be in the files of the Tinker National Bank?

A Yes.

MR. GILLEN: I offer that into evidence.

MR. RITCHIE: The Government's objection to AZ is the following: Relevance alone.

I believe that it has been proven that it is admissible under 28 United States Code Section 1732. That is not the Government's objection.

The Government would object on the grounds of relevance until established through proper testimony.

With respect to AZ prime or AZ-1, I should say,

again the Government's objection would be relevance at this point and also the fact that this is not a document prepared by the Marine Midland Tinker National Bank.

THE COURT: It has what I suppose might be called some of their entries on it.

If you can, Mr. Koch, be able to say whether or not --

MR. RITCHIE: I withdraw that objection. There are certain entries,on here that would be placed on here by the bank.

THE COURT: Can you tell whether or not that would have been processed by your bank?

THE WITNESS: Yes, I can.

THE COURT: Can you relate it to exhibit AZ for identification?

THE WITNESS: Yes, I can.

THE COURT: Would you say it's collection is reflected in the account?

THE WITNESS: Yes, this was processed through our bank, paid to our bank, and the sums deducted from the account as indicated.

THE COURT: Those two together would indicate to you that the amount of the face of the check was

paid out against that account in the Tinker National Bank?

THE WITNESS: Yes.

THE COURT: Is there anything on exhibit AZ-1 to indicate to you when it was so paid out -- do you need a glass?

THE WITNESS: There is a stamp over it, but it was paid -- taken from the account of Thomas McNamara -- looks like the 28th of June, 1972. That is the date indicated on the statement, so it is stamped.

MR. RITCHIE: My objection would be on the grounds of relevancy, your Honor.

THE COURT: It will be received into evidence subject to connection.

MR. GILLEN: Thank you.

THE COURT: What that means at the moment, ladies and gentlemen of the jury, is you will see when -- if it happens and you are made party to the contents of it -- that the $20,000 which is referred to here was inferentially in existence and in someone's hands on that date -- that is all -- whether to buy a race horse or whatever purpose we do not know.

THE CLERK: Now defendant McNamara's exhibit AZ and AZ-1 in evidence.

BY MR. GILLEN:

Q Mr. Koch, I ask you, sir, on the back there is a date May 28th, 1972.

Do you see that?

Would you explain that to the jury, please?

A The only explanation I have is that it is a human error. This is a date stamp that is set manually. Obviously --

THE COURT: It is a corporate error, isn't it?

THE WITNESS: We employ humans. It should say June 28th, it does say May. The wrong stamp was put into the stamping machine.

Q Someone just put the wrong month on it?

THE WITNESS: Yes, it was paid on June 28th and written on June 28th. I assume that was an error.

Q Does AZ reflect that the debit was made on June 28th of $20,000?

A Yes, it does.

Q And there is no other $20,000 item in AZ?

A No, sir.

Q If you look at this check, could you tell the jury please, just what that represents?

A This is a check in the amount of $20,000 pay to the order of cash, signed Thomas McNamara, endorsed by

Thomas McNamara -- by James McNamara.

Q Is there an officer's initials on that?

A Yes.

Q Do you know who that is?

A No.

Q Why would an officer initial the check?_

A This is such a large check that we do not handle at the window regularly and an officer would have to authorize the payment of $20,000.

Q We are talking about $20,000 green American dollars --

THE COURT: Currency.

A Currency.

Q Is that correct?

A That is correct.

Q You can't tell from the check -- is there any numbers on the check to give any indication as to the time of day?

A I do not think so, no.

Q No date stamp or anything like that?

A There is a date stamp, but nothing that tells the time of day.

Q What about these numbers here, would they indicate any numbers of the transaction during the day?

A I have no idea.

Q You do not know?

A No, I don't.

MR. GILLEN: I have nothing further.

REDIRECT EXAMINATION

BY MS. KATZ:

Q Can you tell this Court what date you appeared before the grand jury?

A No, it was May 16th -- was it May 16th? I do not have the subpoena with me.

Q Would this refresh your memory?

A I am sure it will.

It was May 16th.

MS. KATZ: We have no further questions.

Excuse me, we have one more.

Q Is it normal --

MR. GILLEN: One moment, yourHonor.

MR. LEONE: Move to strike that. We do not understand that.

Did he testify before the grand jury, what's the purpose?

THE COURT: Because that was used as a bench mark for questions which Mr. Gillen asked.

Is that right?

MS. KATZ: Yes.

Q Is it standard procedure for a check in the amount of $20,000 to be made out in cash -- is this usual?

A It's not standard, because most people do not have that kind of money in their accounts.

Q Is it usual?

A It does happen.

Q You would say this is a usual procedure for them to make it out in cash when you are dealing with that amount of money?

THE COURT: Well, I think if we get into that the roof will fall in.

MS. KATZ: Thank you.

MR. GILLEN: Nothing further.

(Continued next page.)

MP

AM :3R1

MR. RITCHIE: Your Honor, may we have a sidebar?

(The following took place at sidebar.)

MR. RITCHIE: At this time, your Honor, the Government has that gleam in its eye.

THE COURT: About resting?

MR. RITCHIE: Yes.

THE COURT: His wife said if you don't get home early this weekend --

MR. RITCHIE: She'll kill me.

MR. GILLEN: That raises an interesting question from me. My other client that has been a phantom from the courtroom is the Government going to retry the case against John McNamara?

MR. RITCHIE: The question of John McNamara has undergone a number of changes after these hearings with Harold Goberman and his examination and Mr. McNamara's testimony --

MR. FISCHETTI: Can we dismiss the Jury? We might be a while here.

THE COURT: You remember before lunch Mr. Ritchie said just before he rests there might be a couple of things he wants to discuss at sidebar. Do you want to release the Jury?

MR. RITCHIE: Yes.

(The following took place in open Court.)

THE COURT: We will have a short recess now -- please do not discuss the case with one another--

THE CLERK: All rise, please.

THE COURT: -- or with anyone not on the Jury until it is given to you to decide.

(The Jury left the courtroom.)

MR. LEONE: Could I step out for thirty seconds while other counsel --

THE COURT: Yes.

MR. GILLEN: This belongs to somebody.

MR. RITCHIE: I don't believe it belongs to us. Maybe it's the law clerk's.

THE COURT: Magic doesn't rub off.

MR. MEISELMAN: It says DeLiso.

MR. FISCHETTI: That's my client.

THE CLERK: It was lying here.

MR. GILLEN: Just leave it here then.

MR. RITCHIE: With respect to John McNamara, the Government is not going to call him as a witness. there is still an immunity --

THE COURT: First, have you been authorized to grant him immunity?

MR. RITCHIE: No. I was speaking this morning with an individual in Washington who stated to

me there was a problem with immunity in this case because it is a father and son relationship.

The Government may acquire authorization from the Attorney General next week. They are having problems because it is not the normal immunity situation.

You have a father and son relationship here. They have a policy against that sort of thing --

MR. GILLEN: It's a wise policy.

THE COURT: At least for this case.

MR. GILLEN: For the American family.

MR. RITCHIE: I don't know whether I will get it or I am not saying I won't use John McNamara on rebuttal. With respect to a later trial for him, I don't believe that is a material issue in this trial and it will be something that I am sure your Honor will take up at any time if the Government proceeded to trial.

MR. GILLEN: I think Mr. Ritchie has every intention of retrying John McNamara as of this moment.

THE COURT: I understand your thought with interest but without conviction --

MR. GILLEN: I hope it is without conviction here too, sir.

MR. RITCHIE: Now, I would imagine the next point is Brady material.

With respect to Brady material, I don't believe there is any in this case.

There is a possiblity of Brady material with respect to the conversations with Helen Goberman. I think the Government related whatever information it has already with respect to her. I am taking a very -- what I consider liberal view of Brady now.

With respect to other Brady material, I don't believe it is but I will inform defense counsel that Detective Joseph Isola did not recall any limping on the part of --

THE COURT: Did you or Mr. McMullen interview him?

MR. RITCHIE: Mr. Bavos, Detective Bavos that is and Detective Isola were interviewed from what I understand together at least --

THE COURT: Was there a 302 on that?

MR. RITCHIE: There was a 302 on Detective Bavos.

MR. GILLEN: Is there any 302 --

MR. RITCHIE: Detective Isola was subpoened to appear by the defense at the last trial and not

used. There was no 302.

MR. GILLEN: Wait a minute. The detective was here during the Government's case. I might have served a subpoena --

THE COURT: To hold him here?

MR. GILLEN: And what had happened was the Government never used him and actually we closed our defense very quickly. I might have had him here like I have a whole bunch of subpoenas out now.

THE COURT: All you are saying is his name is not unknown to you?

MR. GILLEN: No. But I never knew --

THE COURT: You know who he is?

MR. GILLEN: I never knew of this interview where he said he don't recall the limping.

THE COURT: But the 302 should disclose who was present at that Parvese interview.

MR. RITCHIE: There is no 302 with respect to Detective Isola.

THE COURT: There is a 302 on Detective Pavese?

MR. RITCHIE: Yes.

THE COURT: And does that disclose that Mr. Isola was present when Mr. Pavese was interviewed?

MR. GILLEN: No.

MR. RITCHIE: No.

THE COURT: I take it he didn't examine him at headquarters?

MR. RITCHIE: I wasn't present. They both came in at the time of the last trial.

Detective Pavese recalls the limp and Detective Isola did not recall the limp.

For certain reasons, the Government chose not to call Detective Isola. We found out he was under subpoena by the defense and he was not used --

THE COURT: You mean also under subpoena by the defense?

MR. RITCHIE: It is my understanding he has a personal friendship with John McNamara. I don't think that the Government could suppress anything concerning Detective Isola's recollection.

MR. FISCHETTI: I think Mr.Ritchie is saying that Detective Pavese and Detective Isola were interviewed at the same time.

THE COURT: No, as I understand him, I don't know whether by shaking his head or not, when I said that to him I got the impression it was incorrect.

MR. FISCHETTI: They were interviewed at the same time.

MR. RITCHIE: I am not certain. I know that Detective Pavese was spoken to and it was my understanding that Isola was also there. There is no record in the 302.

THE COURT: THere is no intimation?

MR. FISCHETTI: What I am trying to call your Honor's attention to is Detective Pavese and Detective Isola, I am sure, if you ask Mr. McMullen, were interviewed at the same time.

Detective Pavese said he recalled Mr. Goverman limping. We have a 302 on that.

Detective Isola said he doesn't recall him limping. There is no 302 on that.

THE COURT: I didn't hear Mr. Pavese quite say that.

MR. FISCHETTI: He says it in the 302. He is telling us under Brady Isola did not see him limping. There is no 302 on that. But there is one on Mr. Pavese.

MR. RITCHIE: Whatever --

THE COURT: He saw no limp at the Pioneer, or any place else, until Mr. Goberman drew his attention to the matter as he stumbled without falling going up the steps inthe stationhouse and he didn't notice anything untoward and at that

point he would say yes, he seemed to me to be having difficulty with his leg. That's what he said as near as I can remember. I don't --

MR. FISCHETTI: I was commenting perhaps not at the proper time but I really haven't seen any interview of witnesses without 302's in any other cases I have tried.

MR. RITCHIE: There has been a trial here and a retrial inthis case --

THE COURT: That is neither here nor there.

MR. FISCHETTI: It really isn't.

THE COURT: I think, maybe it is better for us to participate in Mr. Ritchie's effort of what he is trying to do to make sure that he discharges his conscience of any responsibility he may have under Brady and similar cases.

MR. RITCHIE: Your Honor, with respect to -- I had never considered this Brady.

THE COURT: Just pour.

MR. RITCHIE: Under your Honor's rulings in this case concerning the admissibility of statements by Thomas McNamara to other individuals that he hadbeen threatened --

THE COURT: This is just one of those cases, it is a little bit like that Zitto case, the

atmosphere is here also, it is the condition of the case in which the course ofthe fact we are talking about threats and the inducement of fear getting things without consent, with consent induced by violence or threats of violence etc., that we are concerned with, because this is a conspiracy case.

The Government could win even if no one lay a finger on Goberman, if they had scared him so hard with the threat to lay a finger on him, that he gave up whatever it was, then that kind of case is all but inevitable that the state of mind of the alleged aggressor and the alleged victim become relevant.

And declarations of what is on your mind etc., etc. therefore comes in. We have here the question of invention. The argument is that Mr. McNamara invented all these threats in February. The argument on the defendant's side is that Goberman invented all these threats and beatings and so on after consulting counsel and after he was made to realize that if he wanted to start any lawsuits he had to get around that release now.

MR. RITCHIE: I am not disagreeing with yor Honor's ruling but --

THE COURT: When you are asking about the $20,000, I once had $40,000 in cash in my hands on Wall Street with an armed guard.

MR. RITCHIE: Was it a check paid to cash, your Honor?

MR. FISCHETTI: He had the cash he said.

MR. RITCHIE: Is it normal in a $20,000 check that it is going to be written to cash or to the payee?

THE COURT: When it was handed to me we got scared and asked for protection and they handed us an elderly man whom we assisted, an elderly uniformed man, whom my client held on one hand and I on the other while he protected us.

He was protecting us while we had what we claimed was the bank's money in case we lost it.

MR. RITCHIE: I am not disagreeing with your Honor's ruling but to explain why the Government did not make mention of the interview at the close of the last trial --

THE COURT: You see, we know where he is. He is available in the community and you gentlemen know that he does not remember a limp. That is the important thing. And you have not yet opened your defense.

MR. RITCHIE: The other individual is a Robert Creighton --

THE COURT: Robert?

MR. RITCHIE: Creighton, a Detective Sergeant Robert Creighton.

MR. MEISELMAN: I think he was referred to.

. THE COURT: This has nothing to do with Mr. Ritchie's accent, it is just that I can't hear certain --

MR. RITCHIE: I am sorry for mumbling.

MR. MEISELMAN: Sergeant Creighton is Detective Pavese's supervisor.

THE COURT: I think his name was mentioned in passing here.

MR. RITCHIE: Yes, Detective Sergeant Creighton informed the United States, and there is a 302 on it, I would like to excise it before I present it to the defense counsel, that he interviewed Thomas McNamara in the course of June, 1972, and Thomas McNamara at that time mentioned certain threats to him.

It is my understanding that Detective Sergeant Creighton was present under subpoena to one of the defendants.

MR. GILLEN: I never knew this. This I

never knew. He was under subpoena for another reason.

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(Continued on next page.)

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THE COURT: Do you know the date of Mr. McNamara's interview with him.

MR. RITCHIE: It was back in 1972, your Honor, October or November.

THE COURT: You see, that could be quite important if they want to use him as a witness because it might enable him to speak with more competence, so I think you had better exhibit it to them.

MR. RITCHIE: I believe that I can excise it.

THE COURT: It has other matter in it?

MR. RITCHIE: It is like that statement, that signed statement of Allen Goberman. We all want a little bit of a surprise in our cross-examination.

MR. GILLEN: Come on!

MR. RITCHIE: With Brady material being what it is, it is very hard for us, but I can excise it and present the Brady material to the defense.

MR. FISCHETTI: I would ask your Honor to examine it in camera.

MR. LEONE: I am not quite sure I understand this:

Is the Government saying that they knew that Thomas McNamara, or at least they had information that Thomas McNamara informed a detective of the

Suffolk County Police Department that threats have been made against him by Mr. Goberman?

MR. MEISELMAN: In June.

MR. LEONE: In June of 1972, and Mr. McMullen has testified on the stand that he made attempts to check these things out and could not verify any of those things, is that what the Government is telling the defense counsel?

Maybe I don't understand what they are saying.

THE COURT: If you misunderstand so clearly in the future, God save me from misunderstanding.

All right.

MR. LEONE: Yes.

MR. RITCHIE: Your Honor, these threats related by Thomas McNamara were never threats related to himself.

MR. LEONE: They weren't that specific.

MR. RITCHIE: They weren't threats to himself.

THE COURT: We will see as soon as Mr. McMullan is here to show us.

MR. RITCHIE: They were hearsay threats, your Honor.

MR. GILLEN: I subpoenaed the Suffolk County Police Department for any complaints made by John McNamara and what I got was this thing about the gun.

I was looking for any complaints. I know a Charles Sweet and that he was called to testify in the grand jury, now what about his 302.

MR. RITCHIE: I have the grand jury testimony, I have considered the 302, they were never threats related from Harry Goberman to either Thomas McNamara or John McNamara or to any of the other McNamaras, but always to a third person.

THE COURT: We had better get all of this checked.

MR. GILLEN: I would like to remark that this is a retrial and we have made --

THE COURT: At this moment I am just interested in the matters we have before us.

MR. GILLEN: I am prepared to proceed unless the Court dismisses the case.

THE COURT: I can't promise to do that.

Now, you realize we have to quit at 4:30 because we have one or two jurors whom I think feel pretty strongly about such matters.

MR. FISCHETTI: I don't want a delay by the defense, I think if this document indicates what Mr. Ritchie said, and I think I would ask to speak to fellow counsel as to whether or not we shall be allowed to put Mr. McMullen back on.

MR. GILLEN: Relax, please.

MR. FISCHETTI: All right, I am sorry, withdrawn.

THE COURT: You can do one or two things, unless Mr. Ritchie is prepared to agree that there can be a dismissal as to one or more of the individual defendants, and I would reserve decision on all motions until the close of the whole case -- but first there is one thing that I and my clerk want to check.

Well, at page 239, line 18 -- well, line 17 and 18, this is related to the 28th, the question was:

"Who beat you up?"

And the answer was, "John McNamara, Rocco Merolla, Angelo Merolla, John DeLiso, Fat Nicky and Alphonse."

Now I think that is perhaps the only place where anything was said about Mr. Alphonse M. Merolla, apart from the fact that he could not be said to have done anything except lend the menace of his presence on three occasions, on three or four occasions possibly at the Candlelight and in the office on the 5th and on the 28th --

MR. LEONE: Right.

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THE COURT: Of course that is about to keep him in the case if anybody is in the case.

MR. LEONE: I like your delivery, Judge, I love your delivery, it never fails to surprise me.

I thought you were going to say, How was their proof of extortion, how were all the elements of extortion proved.

THE COURT: Well, I was wondering how you were going to walk him out unless you say he was just standing there and was guilty of misprision.

Now if the jury has the power to believe, and that coupled with the allegations that he was visibly present and cognizant of what was going on, I think it would make it difficult for me to take it from the jury.

I don't think we want to talk about interstate commerce at this point, do we?

MR. MEISELMAN: Except to call your Honor's attention to one thing, and that is that the witness put on the stand, the chief witness of the prosecution, if I may call him that, Mr. Harold Goberman --

THE COURT: You will in your closing argument, so you might as well now.

MR. MEISELMAN: Mr. Goberman as the Government's

witness testified under oath that as of July 6th, I believe, and the exhibit is in evidence, and the mechanic's lien, that all material that had been manufactured for this site had been delivered to the site.

On that statement alone, your Honor, it would appear that there was no obstruction, delay or affectation of interstate commerce by this witness' statement under oath, the prosecution's witness.

MR. RITCHIE: That was impeachment material, number 1, number 2, the evidence is --

MR. MEISELMAN: What difference does it make.

MR. RITCHIE: The evidence is in fact that there were installations after June 28th, 1972.

THE COURT: Did this Brady fellow have any late deliveries -- no, his deliveries were in May, I think.

MR. RITCHIE: His deliveries were in May but the goods had not been installed.

MR. GILLEN: Because of a spray, they had to send for another spray.

THE COURT: Well, let us not worry about that because I think we are all pretty clear, and I don't think that Mr. Ritchie cares much about what

we think about it, that all of this stuff had been brought to the site that we have had any mention of --

MR. RITCHIE: That is correct, your Honor.

THE COURT: -- and that the interstate material that we have mention of was to be delivered after the 28th but that the flow of interstate commerce wasn't ended until it were erected into the building and became what we used to call anciently fixtures and parts of the freehold.

MR. RITCHIE: Yes, your Honor.

THE COURT: Is that about it.

MR. RITCHIE: Yes, I think that is a fair summary of the evidence.

THE COURT: Then the other thing is whether or not he can invoke the automobiles, that is the flow of automobile parts, and we don't have any evidence about that, the automotive parts assembled in the automobiles came from out of state throughout this period and their destination was affected, if not their volume.

MR. MEISELMAN: I think there was a stipulation in the record, your Honor, that the McNamara Re: Nu Cars, Inc., was not a dealer and didn't have to buy them.

THE COURT: I think that we are absolutely

solid upon that that there wasn't any dealership arrangement that touched McNamara Re: Nu Cars, Inc., if that is material, and I think Mr. Ritchie would be prepared to argue that you can have that fact but that it is not material.

(Continued next page.)

4pm2

Ek:MM
T4R2

MR. RITCHIE: It is the purpose for which the building is being constructed, and that --

THE COURT: That is right, because that is what was interfered with and it is the affect of that interference on commerce, and it doesn't have to be the same commerce. For example, if you stop a truck you are stopping interstate transportation of the truck and that is damaging the freight line which hopes to get paid for carrying freight; at the same time it interferes with the interstate commerce of everyone who has a shipment on the truck, even though they are owned by fifteen different companies, including one which is usually shipping in superior televisions and other electronic equipment from Japan.

MR.MEISELMAN: Assuming, your Honor, that the truck had already delivered its freight, the freight had come to a rest and the truck was now empty, --

THE COURT: Well, we can get pretty expert at keeping that in commerce until it is actually picked up from the shipping dock by the ultimate customer and taken to his warehouse.

MR. MEISELMAN: Perhaps I picked the wrong simile.

THE COURT: No, I can't go along with that at this time because as I outlined earlier my concern is with -- well, it is not just exactly that, I think that there is enough interstate movement around, the only question is whether this is the kind of affectation of commerce that the statute is concerned with and whether the wrongful conduct here is sufficiently connected with the interference with commerce, which we concede here.

MR. RITCHIE: May I just make one point and that is the affect on commerce by having him sign a contract release --

THE COURT: What was that?

MR. RITCHIE: By having Harold Goberman sign the contract release the defendants were taking a man out of the commerce in which he was at the time engaged, and that is I think by extortion, and I think that is precisely the type of affecting of commerce --

THE COURT: I think that is a new way of putting it, that is a little cuter.

MR. RITCHIE: I think that is precisely the type of affectation that the congress is concerned with.

THE COURT: In other words to affect an

innovation by force and violence in an interstate contract affects the commerce.

MR. RITCHIE: I think to end a person's involvement in commerce is to affect commerce.

THE COURT: Okay.

You were anxious to get a witness on today for some reason, Mr. Gillen?

MR. GILLEN: Well, no, I thought, your Honor, if we did have time then first of all --

THE COURT: We have an hour and six minutes.

MR. GILLEN: Then I have time.

First I would like Mr. McMullen's notes.

MR. RITCHIE: What notes?

MR. GILLEN: The original notes that were marked for identification.

MR. RITCHIE: On Dorothy Tomasselli?

MR. GILLEN: And the 302 on Kreighton, and I think there was also a 302 on Charles Sweet.

MR. FISCHETTI: You will remember I did make an application for a limiting instruction with regard to their four witnesses, I believe Kosch, Sini, Shea and DiNunzio, I believe.

THE COURT: Who is the third one?

MR. FISCHETTI: Kosch, Kosch.

I think Mr. Shea was the first witness.

Am I correct, that was the proper order?

THE COURT: No, no.

Shea was the first witness, the second witness was --

MR. FISCHETTI: Sini.

MR. RITCHIE: Sini, yes, the third was Gniazdowski and then Kosch, I think those would be the four affected witnesses.

MR.FISCHETTI: I agree.

THE COURT: Well, didn't Mr. Gniazdowski testify?

MR. RITCHIE: I don't believe that Mr. Gniazdowski testified about the search warrants.

MR. LEONE: Mr. McMullen did.

MR. RITCHIE: Yes, Mr. McMullen with respect to that testimony concerning execution of the search warrant and the conversation with Timothy Shea.

MR. FISHETTI: Right.

Now the others were applications with reference to this purported Brady material that your Honor is going to look at, the 302's.

Now, if your Honor pleases, if it turns out to be Brady material which we can use, may we have the right to put Mr. McMullen back on cross during our case so we don't have to delay now and

can continue.

THE COURT: You mean right now?

MR. FISCHETTI: Not now, at a little later time.

THE COURT: Well, he will be here.

MR. RITCHIE: All of these alleged threats that I am turning over is only because of your Honor's recent ruling. I must emphasize, your Honor, because I would not have kept them to myself so long --

THE COURT: Let me say this, if we try this case and there is a verdict, then I wouldn't relish having to go over the whole blessed thing because of some curable thing like Brady material was not promptly and earlier produced.

I mean whenever defendants get one of these grand rights like the Brady rights or something like that, I mean the sensible thing to do is to kill them with irrelevant material that they might find useful.

MR. RITCHIE: Your Honor, what I will do, then, is I will turn over the 302's and the Grand Jury testimony of Lieutenant Charles Sweet, I will turn over the 302 concerning Sergeant Robbi Kreighton, we will have them marked as Exhibits

for identification.

MR. GILLEN: Did he testify at the Grand Jury?

MR. RITCHIE: I will turn over whatever Brady material I have, your Honor.

He didn't testify in the Grand Jury.

THE COURT: And who was the other lad, Mr. Pavese?

MR. RITCHIE: Mr. Isola, Detective Isola.

Now I have informed the defendants' attorneys of what I believe was Brady material. Detective Isola testified basically as to what Detective Pavese testified to, but he doesn't recall the limp.

THE COURT: Okay.

MR. FISCHETTI: Okay.

Does he rest now or is he reserving or what?

What do you want to do?

MR. RITCHIE: Your Honor, I will get that material over and bring it here, and can I, you know, nunc pro tunc, I will rest nunc pro tunc till then.

THE COURT: You mean until after I see the Brady material?

MR. RITCHIE: Yes, your Honor.

THE COURT: I don't see what it has to do with resting.

MR. RITCHIE: The reason I am doing so is to meet my obligation to turn it over before the Government rests.

THE COURT: All right.

MR. FISCHETTI: There is no objection.

THE COURT: All right, let us get it up.

Have you anything in the room now that you can start giving to us?

MR. RITCHIE: It is over in the office -- some of it is over here but certain written documents are over in the office.

THE COURT: Give me what is here and if it is ready for immediate turnover, that will be turned over right now.

MR. RITCHIE: What we are going to do is take a break, your Honor, because --

THE COURT: Yes, if we can give it to them they can be studying it now during the break. There is no reason why they should have a comfortable break.

T3 fls (Continued on next page.)

T4R3
EK:MM

MR. FISCHETTI: I believe we can start, if that is what your Honor wants.

MR. LEONE: Let's get the stuff first.

THE COURT: No, you see, because he wants to turn this over before he rests.

MR. FISCHETTI: Okay.

MR. RITCHIE: GOvernment's Exhibit --

MR. LEONE: One other matter, your Honor:

I would ask for a stipulation or the Court can inform the Jury in some manner that in fact my client, Alphonse M. Merolla, in January of this year was not a defendant on trial in this case.

I think we do have an agreement on that, and of course that is a fact, but during the cross-examination I did not prove that.

If the Government will stipulate that in fact Alphonse Merolla was not a defendant, or I will have to prove it --

THE COURT: Do you agree that Alphonse Merolla was not a defendant at the trial in January.

MR. RITCHIE: Yes, your Honor.

MR. LEONE: I did not do it in front of the Jury, but I do want to say in summation it is a fact in evidence.

MR. RITCHIE: I will so stipulate, your Honor.

I have no problem with that.

MR. LEONE: If I ever get to the Jury.

MR. MEISELMAN: Are we in recess, your Honor?

THE COURT: Yes, subject to his getting his minutes.

THE CLERK: Government's Exhibit 30 for identification is what?

MR. RITCHIE: Govenment's Exhibit 30 for identification is possible Brady exculpatory material, a report of Mrs. Dorothea Tomisselli dated October 3, and October 4, 1974, that is marked Government's Exhibit 30 for identification.

THE CLERK: So marked.

MR. RITCHIE: Government's Exhibit 31 is the Grand Jury testimony dated December 13, 1972, with respect to Lieutenant Charles A. Sweet.

THE COURT: Charles who?

MR. RITCHIE: Charles Sweet.

THE CLERK: So marked.

MR. RITCHIE: Govenment's Exhibit 32 for identification is a one-page report of interview dated November 1, 1972, concerning Detective Sergeant Robert Kreighton of the Suffolk County Police Department, that is Government's Exhibit 32 for identification and copies have been turned over as Brady material,

possibly.

THE CLERK: So marked.

MR. GILLEN: Where are the notes of Mr. McMullen?

MR. RITCHIE: The notes concerning Dorothea Tomaselli have already been marked for identification they are over in our office, they will be brought over here.

MR. GILLEN: Where is the 302 of Mr. Sweet?

MR. RITCHIE: Didn't I turn that over?

MR. GILLEN: No.

MR. RITCHIE: I'm sorry.

THE COURT: Are those additional copies of material or --

MS. KATZ: Yes, these are just additional copies and I will go up and get the original one.

MR. RITCHIE: Your Honor, the Grand Jury minutes why don't we mark them in thirty-one, I will put it on here.

THE CLERK: Part of 31.

MR. RITCHIE: Exhibit 31 for identification is now not only the Grand Jury testimony concerning Charles A. Sweet but attached to that, under the same stamp, is a two-page report of interview dated December 7, 1972.

Are we going to be taking a break, your Honor

or not?

THE COURT: Yes, if this is all marked now.

MR. RITCHIE: Yes, it is.

THE COURT: Okay.

(At 3:35 o'clock p.m. a recess was taken.)

HS fls6

(Continued on next page.)

S:MM
5R1

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MR. RITCHIE: Your Honor, the United States rests its case.

MR. GILLEN: May I proceed?

THE COURT: Yes.

Decision on the motions I reserved.

MR. GILLEN: Miss Tomasselli.

D O R O T H E A H E L E N T O M A S E L L I, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Dorothea Helen Tomasselli, T-o-m-a-s-e-l-l-i.

DIRECT EXAMINATION

BY MR. GILLEN:

Q Is that Miss or Mrs?

A Miss.

Q By whom are you employed?

A Currently McNamara American.

Q In June of 1972, by whom were you employed?

A McNamara Buick Pontiac.

Q Where is that located?

A 1972?

Q Yes.

A We were at 100 Main Street -- 102 Main Street, Port Jefferson.

THE COURT: Would you speak into the microphone, so they can hear you.

Q Do you know Thomas McNamara?

A Yes, I do.

Q He was one of your bosses?

A Yes, he was.

C Still is?

A Currently, no.

Q Is his son your boss?

A Yes.

Q Timothy?

A Yes.

Q Specifically, on June 5th, 1972, where did you work in the building at Port Jefferson?

A I worked on the second floor office.

Q Will you describe those offices for us?

A Well, thereaare two offices with a small alcove and you want to know the size of the office?

Q Just tell us first how many rooms.

A Actually two rooms.

Q Did Mr. McNamara have his office in one of those rooms?

A Yes, he did.

Q Was there anyone else in the office with him?

A Yes, Mr. Sherman.

Q Was that office facing on the street?

A That office faced Main Street.

Q And was there another room?

A Yes.

Q Whose office was the other room?

A That was mine.

Q Was there a connecting space between the two rooms?

A There was a doorway.

Q Was there a door, Miss Tomaselli?

A No.

Q Ars you sure of that?

A Yes, because we took down the door -- see the second room has a closet with two sliding doors and all the doors were moved, because we have file cabinets in there -- it is like an apartment type of office and the doors were removed.

Q When were they removed?

A When we moved from the downstairs office to the upstairs office.

Q When was that?

A Let us see, we had the upstairs office for about two years and we went out of there two years, so it is four

ago.

Q At least two years prior to June 5th, those doors were removed?

A Yes.

Q So there was a passageway, but no door?

A Right.

Q That you are positive of?

A Right.

Q Do you know a man by the name of Harry Goberman?

A Yes.

Q Now, I show you what has been marked as Government's Exhibits 16 and 17.

Would you tell us please, did you ever see those documents before?

(Shown to witness.)

A Yes.

Q Were you present when Government's Exhibit -- excuse me -- 16 was signed?

A Yes.

Q Who signed it?

A It was signed by Harry Goberman.

Q Had you been asked by anyone to witness this signing?

A Yes, I was.

Q By whom?

A John McNamara.

Q Will you tell us please did you sign the document?

A No, I didn't.

Q Did you have a conversation with John McNamara at the time it was signed?

A Yes, I had asked him if he wanted me to sign it and he said, "No, just having your watching Harry sign it was enough."

Q Do you know a man by the name of Alex Gniasdowski?

A Yes.

Q Was he there at this time?

A Yes.

Q He is a notary?

A Yes.

Q Did Harry Goberman read that document, if you know?

A Yes, he did.

Q How do you know?

A Because while I was in the room he -- while he was reading he stopped and asked John McNamara -- I do not know -- some questions about it -- not questions, they discussed it. He was reading it and stopped and he had something

to say about it and he went on and was satisfied with it and signed it.

Q Did he and John McNamara talk?

A Yes.

Q Do you recall what they said?

A No, I really don't.

Q Now -- incidentally, on this date June 28, correct?

A Yes.

Q Do you have any independent recollection of the date other than you see the date on there?

A No -- other than that? No.

Q In other words, if I asked you what date it was without that paper, would you be able to tell us the date?

A The date itself, no.

Q So you get the date fromthe document, correct?

A Yes.

Q Thank you.

Now, were you asked to do anything else that day?

A Well, when I left John McNamara told me to all Harry a cab.

Q Did you?

A Yes, I went down the hall to my own office and

I called a cab from there.

Q Where did this take place?

A This was in Jimmy's office.

Q Where is that?

A Where this was signed?

Q Yes.

A Jimmy's office is down the hall about thirty feet down the hall from my office.

Q And is that also an apartment?

A Yes.

Q Does Jimmy live there?

A Yes.

Q Is there office machinery in there?

A Yes.

Q Like what?

A Well, right now?

Q Back on June 28th.

A Back then?

Q Yes.

A Let me see, I had a typewriter and an adding machine and a calculator and there was a desk and a couple of chairs.

Q Now, did the cab come?

A Yes, it did.

Q Do you know whether Harry Goberman got into the cab?

A Yes, I do.

Q How do you know that?

A Well, after I called the taxi cab for Harry, about a minute or so later, I had to go downstairs to the service office and Harry came down the stairs after I did and he was standing in the small hallway waiting for the taxicab and now in the service office there are large windows that face Main Street, and standing there you can't help but see things, and the cab pulled up and Harry left the hallway and went out and went on to East Main Street and got into the taxicab.

Q Was he limping?

A No.

Q Did you observe his clothing on that day?

A Yes.

Q You looked out, right?

A Yes.

Q Did you see any rips in his clothing?

A No.

Q Did you see any rips in left shoulder where I am indicating where the shoulder meets (indicating) a three or four-inch rip?

A No.

Q Do you have any experience inthe clothing line?

A My parents were in the garment line and if his clothes were ripped, I would have noticed it.

Q Who else if anyone was in that room -- in Jimmy's room onJ une 28th, other than I think you told us yourself, John McNamara, Alex Gniazdowski and Harry Goberman?

A Al Merolla and Angelo have come in.

Q Who is Angelo Merolla?

A Angelo Merolla?

Q Yes.

A He worked for us.

Q What was his job?

A He was the sales manager.

Q And Al Merolla, is he any relation to Angelo?

A It is his brother.

Q Had he bought cars from the McNamara's

A Yes.

Q Did other relatives of Angelo buy cars from the McNamara's?

A Yes, we sold cars to probably most of his family.

Q When you were in that room, did Harry Goberman complain of anybody beating him up?

A No.

Q Did he have any marks on him?

A No.

Q Was his clothing disheveled or anything like that?

A No.

Q Do you see Angelo Merolla in the courtroom?

A Yes.

Q Will you point him out?

A The second row -- that's Angelo Merolla.

Q Do you see his brother Alphonse Merolla? Al Merolla?

A In the blue jacket (indicating).

Q And Mr. Tom McNamara is over here?

A Yes.

Q Anybody else in that room on that date?

A Anybody else in that room?

Q Jimmy's room on June 28th, 1972?

A John McNamara was there and Alex and Myself and Angelo and Al and Harry.

Q Now, I refer you to June 5th, 1972, and I show you Exhibits in evidence AM and AN. Have you seen these documents before, Miss Tomaselli?

A Yes.

Q When did you see them?

A On June 5th.

Q If you didn't see a date, would you know what the date was?

A No.

Q Now, but you do see it there, don't you?

A The date, yes. That is the date it was notarized.

Q Did you see those documents onJune 5th?

A Yes.

Q Where did you see them?

A At my desk.

Q And your desk now is in the office where the two offices are; is that right?

A Right.

Q Did you see Harry Goberman that day?

A Yes.

Q And who else was there when HarryGoberman was there?

A Mr. Sherman, Thomas McNamara --

THE COURT: Whom?

THE WITNESS: Thomas McNamara.

THE COURT: Yes.

A (Continuing) -- and Alex, myself -- do you mean during the course of that day -- the whole day?

Q Well, in the time that Harry Goberman was there -- withdrawn.

Is this a public place, a lot of people in and out at that time in the office?

A In the office?

Well, mostly employees, come in and out -- public I wouldn't actually say public -- there are times that other people would come in through the office.

Q Were there other people living in apartments on that floor?

A There are -- I believe it is nine apartments.

Q So these people are free to go through the hallway -- the common hallway, correct?

A Yes.

Q And there are employees that would come in and out at any given time into the office for whatever reason, correct?

A Yes.

Q Forgetting about all those other employees, just when Harry Goberman was there, was there anybody else there?

A On this particular day?

Q Yes, to your recollection?

A Besides Harry and Mr. McNamara, the people I

discussed this cab with and Mr. Sherman and myself.

At that particular time I don't recall anyone else there.

Q How about John McNamara?

A John, I don't remember him being there, but he is so -- he is always around, I am sure he would have been around that day, but he wasn't -- I don't recall him being there when I discussed this MV51.

Q Do you know a man named Allan Goberman?

A I only know him by name.

Q Do you know him by sight?

A No.

Q Have you ever seen him?

A Not that I know of.

Q The reason you don't know, is because you don't know him -- he could be standing right in front of you and you won't know him as Allan Goberman?

A Right.

Q Was Harry Goberman, to your knowledge, beaten up on June 5th?

A No.

Q Did he complain of any beatings?

A No, he never did.

Q Did you notice any marks on him or anything

like that on June 5th?

A No.

MR. GILLEN: Excuse me a minute.

(Pause.)

Q Let me ask you this:

Were you ever asked to leave thatroom on June 5th, 1972 -- were you told to leave the office?

A No.

Q Were you ordered to leave the office?

A No, I have never been asked to leave my office.

Q Have yo u during the course of the day left the office for various reasons?

A I am in and out. That is common to go downstairs, upstairs or into the service office or the building office. I could be up and down, but I never ever ever have been asked to leave my office.

MR. GILLEN: Nothing further -- one moment, please.

(Pause.)

MR. GILLEN: Nothing further, your Honor.

MR. LEONE: No questions.

MR. RITCHIE: May I inquire?

THE COURT: Certainly.

R2 fls (Continued on next page.)

T5R2
HS:MM

CROSS-EXAMINATION

BY MR. RITCHIE:

Q Miss Tomaselli, how long have you worked for any individuals from the McNamara family?

A Eleven years.

Q And what position do you hold?

A Office manager.

Q Directing your attention to June 5, 1972, what had you been doing before you were asked to get that MV51?

A Exactly what I had been doing?

Q Right.

A I couldn't tell you exactly what I had been doing.

Q How long had you been in your office when you were asked to get the MV51?

A I am not even sure what time of the day it was.

Q You don't know whether you had been in your ofice or you were just coming into your office when you were asked that question?

A I had been inmy office, but whether it had been two or three hours I couldn't say.

Q Could it have been one minute?

A No, it wasn't 9:00 o'clock in the morning.

Q Do you ever leave your office during the course

of the day?

A Yes.

Q Does Mr. McNamara ever send you on errands?

A On errands?

Q Yes, I do not mean to demean you.

Does he have you do certain things for him in the course of thebusiness day?

A Well, Mr. McNamara wasn't really directly -- didn't give me any direct orders in my work. He won't have asked me to go take some type of paperwork, that would have been Mr. Sherman.

Q John McNamara never asked you to do anything?

A Are you talking about Thomas McNamara or John McNamara --

MR. GILLEN: Objection, it is argumentative, assuming a state of facts not in evidence.

Q Has either John McNamara or Thomas McNamara asked you to do anything, that is, required you to leave the room?

A Oh, during the course of my work sure.

Q Probably on many occasions, right?

A Right.

MR. GILLEN: Objection to the argumentative quality of "probably on many occasions."

THE COURT: Yes, stricken.

Q Now, on June 5th, you were asked to produce a form; is that not correct?

A Right.

Q Now, is that unusual?

A Is that unusual?

Q Yes.

Have you ever been asked to produce forms on other occasions?

A No, I normally don't handle this type of thing, but if I had been asked what type of form is needed for proof of ownership to a vehicle, I would tell someone that is needed and that is what happened in this case.

Q In the regular course of your business duties --

A It is not the regular course of my business duties, but I would know what to do.

Q With respect to, I believe, defendant McNamara's Exhibit AM, that's the registration, this MV51 -- that's what it is officially called?

A Yes.

Q Have you prepared this MV51 on prior occasions?

A Only in the absence of our billing clerk, I would.

Q Have you though?

A Yes.

Q Other than this one occasion -- on those occasions, have you filled out the card?

A Yes.

Q Have you filled out the card with identification information?

A Yes.

Q And that identification information would include a vehicle identification number, would it not?

A Yes, it would.

Q And also other identifying matter as on the front of defendant's Exhibit AM, is it not correct?

A Description?

Q Yes.

A Yes.

Q How many boxes are on the front of Exhibit AM--

MR. GILLEN: It is in evidence, speaks for itself.

A Do you want me to count them?

THE COURT: Are they numbered, Miss Tomaselli?

THE WITNESS: No, but roughly there must be fifteen or twenty.

THE COURT: Anyway, a lot.

Q How many are filled in?

A One.

Q Now, in the course of your duties you filled them out before; is that not correct?

A That had nothing to do with my duties. This particular form -- this particular form was not filled out for McNamara Buick Pontiac.

Q I am asking you in the course of your duties, have you ever filled out an MV51?

A Yes.

Q On those occasions, have you filled out only one box or more than one box?

A It is completely filled out.

Q In other words, fifteen or so boxes; is that correct?

A Yes.

Q And now, to register that vehicle -- you are familiar with the registration of vehicles with MV51's, are you not?

A Yes.

Q To register the vehicle, you would need more than one box filled out, wouldn't you?

A Right.

Q And there's also a bill of sale, isn't there, accompanying that -- I believe that's AM?

A Yes.

Q Did you prepare that?

A Possibly.

Q Do you know whether you did or didn't?

A Offhand I don't remember.

Q But you do remember the fact that it was filled out --

MR. GILLEN: I would object to that. He asked who prepared it. He is talking about one exhibit in the first instance and then he says -- does he mean the other exhibit?

THE COURT: You mean the bill of sale?

Q Is it typed up?

A Yes, it is typed up.

Q Is there any lines skipped in your typing?

A Yes.

Q Do you remember that being signed on that day?

A I didn't see it signed, no.

Q Do you remember it being signed -- weren't you asked on direct examination about that?

MR. GILLEN: Objection, she was not asked that question, your Honor.

MR. RITCHIE: Then I am sorry. Thank you, Mr. Gillen.

Q Now, with respect to June 28th, was J. Timothy

Shea present in that office?

A No.

Q Was Alphonse Merolla present in that office?

A That's Al Merolla?

Q Yes.

A Yes.

Q Now, did Alphonse M. Merolla or as you know him Al Merolla work at McNamara Buick Pontiac?

A No.

Q Did he ever work at McNamara Buick Pontiac?

A No.

Q His brother Angelo worked there at McNamara Buick Pontiac, did he not?

A Yes.

Q Were there other individuals present?

A Yes.

Q Were there other individuals present besides Harry Goberman, John McNamara, Angelo and Alphonse Merolla?

A Alex and myself.

Q Were there other individuals present other than those, I believe you are up tosix now?

A No, not that I recall.

Q When you say "Not that I recall --"

A No, not that I saw.

MR. GILLEN: I would object to "May have been or might have been."

THE COURT: Please, the witness has not completed her answer.

MR.GILLEN: I object to the question. "Might there have been."

THE COURT: Would you read the witnesses answer.

(Answer read.)

Q Now, what was Angelo Merolla's duties at McNamara Buick Pontiac at that time, if you know?

A Sales manager.

Q Was he in charge of the building of the new site --

MR. GILLEN: Objection, I think the witness has answered the question, your Honor.

Q Was he also in charge of the building of the new site?

THE COURT: She may answer.

A No -- not that I know of. That wouldn't be the duties of a sales manager.

Q In other words, the signing of the contract release would be outside the burden of the duties of a sales manager.

MR. GILLEN: Objection.

THE COURT: Sustained.

Q Now, do you know an individual named Desmond O'Sullivan?

A Yes.

Q Was he present on the 28th in that office?

A No.

Q You did call a cab for Harry Goberman on that date, did you not?

A Yes.

Q And that was upon whose instruction?

A John McNamara.

Q So that date, Mr. McNamara had you enter a room and leave the room; is that not correct?

MR. GILLEN: Objection, that is not her testimony.

Q Had you made a phone call --

THE COURT: Overruled.

A He had me enter the room and leave the room and make a phone call, yes, John McNamara.

Q Is that correct?

A Yes.

Q If you know, how did Harry Goberman get to McNamara Buick Pontiac that day?

A I don't know.

Q And it is your testimony that you observed Harry Goberman leaving McNamara Buick Pontiac: is that correct?

A Yes.

Q And it is your testimony thatyou noted nothing unusual; is that correct?

A That I noted nothing unusual, yes.

Q What were you doing at the time that you observed Harry Goberman?

A I was in the service office at a lower level of the building.

Q What were you doing?

A Exactly what I was doing, I do not know. At the time I was by the desk, which is in front of two large windows.

Q Now, you were engaged in work at the time?

A Yes.

Q You were doing something down inthe service office?

A Yes.

Q You don't remember what you were doing though?

A No.

Q But you do remember observing Harry Goberman happen to walk down the stairs and into a cab?

A I observed him coming down the stairs, because he came down after I did and hearing noise on the stairs I turned around and I saw him walking down.

Q There was noise on the staircase?

A Footsteps.

Q Footsteps?

A If someone else is on the staircase, you could tell. I turned around just as a curiosity and Harry was coming down the stairs and when he got to the bottom -- it is a small hallway -- and more likely I said to him, "The cab should be here any minute."

I wanted him to know that I did call a taxicab for him, that he had been waiting for, and then being downstairs in the office -- for whatever I was doing -- exactly what it was I don't know, knowing the taxicab was expected, when a cab did pull up -- it was just out of curiosity -- I saw the cab pull up and he got into it.

Like you are asked to do something and you want to make sure it is done. When it came I said, "Well there's the cab and off he goes."

That's it.

Q Do you know --

A What I was doing, no.

It was probably that I had to bring service

repairs orders downstairs or pick them up.

Q You have a clear recollection of observing Harry Goberman leaving that building?

A Yes.

Q Now, how long did you observe him walking?

A How long?

THE COURT: Over how many steps or distance or what?

MR. RITCHIE: Yes, your Honor.

Q Over how many steps did you observe him in his walking?

A Well, as many steps as it would take to cross the street.

Q Where was the cab?

A Probably from a distance from the front of the building -- I'd say from here to the first row of seats to where you are standing.

Q So the cab was on the other side of the street: isthat correct?

A Yes, to the best of my recollection it came -- it headed up East Main Street, going towards Setaucket.

Q That doorway, does that exit onto 25A or does that exit onto Main Street?

A It is 25A -- the door Harry went out -- well,

is that -- it is East Main Street. I believe it is also called 25A -- it is not Main Street.

Q Main Street meets 25A?

A Yes.

Q The street that goes along the water, what do you call that street?

A That is East Main Street, it is also 25A.

Q THat's where the door that Harry exited, exits onto?

A Right.

Q Now, the cab was on the other side of the street, is that your testimony?

A Yes.

Q And was it facing in the proper direction -- is it a two-way street?

MR. GILLEN: Objection, proper direction to what?

THE COURT: To move.

A Yes.

Q Was it facing the way traffic normally goes?

A YEs.

Q On that side of the street?

A Yes.

Q It would then be heading in a westerly direction, would it not?

A It was heading towards Setaucket.

Q Towards Setaucket?

A Yes.

Q It didn't have to turn around to head --

THE COURT: It did not have to make a U-turn?

THE WITNESS: See, I don't know whether he came around or went under the light and made a U-turn, but that's the direction he ended up going in towards Setaucket.

Q In other words, you don't know which side of the street the cab was on originally?

MR. GILLEN: Objection, not the witnesses testimony.

THE COURT: No, overruled.

A When he was inthe taxicab -- when he got into the taxicab, it was heading towards Setaucket.

Q It was heading towards Setaucket?

A That's the direction it ended up going in, towards Setaucket.

(Continued on next page.)

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Q So that it didn't have to make a U-turn?

A I don't know if he came from that direction and made a U-turn.

Q By the time Harry Goberman got there there was no need -- by the time Harry Goberman got in that cab that cab headed straight and didnot have to make a U-turn?

A Right.

MR. RITCHIE: No further questions.

MR. GILLEN: I have no further questions.

MR. FISCHETTI: Can we have just one moment, sir?

(Pause.)

MR. FISCHETTI: I have no questions of this witness.

We need one more moment, your Honor.

THE COURT: One more moment.

MR. FISCHETTI: I just have a question.

EXAMINATION

BY MR. FISCHETTI:

Q Miss Tomaselli, my name is Ronald Fischetti and I represent John DeLiso.

We haven't spoken before, have we?

A I don't believe so.

Q On June 5, you identified individuals who were

in that room of McNamara Buick, is thatcorrect?

A Yes.

Q Did you identify everybody you saw in the room at that time?

A Yes.

Q On June 28, you also identified individuals in that room, did you identify everyone that you saw on that day?

A Yes.

Q On June 28, when Harry Goberman was going down and got into the cab, was he alone?

A Yes.

Q Did you see anyone accompany him to the cab?

A No.

Q Did you see anyone put him in the cab?

A No.

Q Did you see this gentlemen with Harry Goberman on June 28th, or June 5th (indicating)?

A No.

MR. LEONE: On June 5th, did you see this man (indicating)?

THE WITNESS: No.

MR. LEONE: Did you see this man in that office on the 28th?

THE WITNESS: No sir.

MR. LEONE: No further questions.

MS. SELTZER: I represent Alphonse M. Merolla, did you see him frequently in McNamara's?

THE WITNESS: Yes.

MS. SELTZER: Did he visit his brother often?

THE WITNESS: Yes.

MS. SELTZER: Can you give us any kind of estimation as to how many times you would see him at McNamara Buick?

THE WITNESS: Gee, it was frequently. He might come in every couple of weeks when he passed by. Sometimes within a period of a week I could see him more than once.

MS. SELTZER: Do you have any idea for what period of time prior to June, 1972, you had been seeing Alphonse Merolla? A period of months or years?

THE WITNESS: About the beginning of Angelo's employment with us.

MS. SELTZER: Thank you, no further questions.

MR. RITCHIE: No questions.

THE COURT: You are excused Miss Tomaselli.

MS. SELTZER: Excuse me, one more question. Do you know if Alphonse Merolla was also in the

THE WITNESS: Yes, he was at that time going back a while he used to be a sales man. I think for another dealer on the island. I think it was a Buick dealer. I am not sure.

MS. SELTZER: Thank you.

MR. RITCHIE: Was it a Buick dealer or Brown Chevrolet?

THE WITNESS: I am not sure.

I know it was another car dealer onthe island. Near us.

MR. RITCHIE: I have a few questions.

RE-CROSS-EXAMINATION

BY MR. RITCHIE:

Q Was Angelo Merolla ever in the McNamara's apartment?

A No.

MR. GILLEN: Objection. Improper re-direct.

MR. RITCHIE: I have no further questions.

MR. LEONE: No questions.

MR. GILLEN: No questions, thank you Miss Tomaselli.

THE COURT: You are excused.

MR. GILLEN: I do have one more short witness.

THE COURT: We have to stop promptly at 4:30.

MR. GILLEN: I'm with you.

THE COURT: Members of the Jury, we will adjourn now until Monday morning at 10:00 o'clock. Please do not discuss the case with one another or anyone not on the Jury until it is given to you to decide.

(The Jury left the courtrcom of one Juror.)

THE COURT: The Juror is quite concerned as to how long she is going to be here.

She has heard from her boss.

MR. GILLEN: We may rest Monday.

MR. MEISELMAN: I would like to reserve on that.

MR. GILLEN: We may very well rest Monday.

THE COURT: Following that, and if Mr. Ritchie has no rebuttal case, then the thing that would happen the closing arguments of counsel and instructions on the law.

I think last time it took a little less than an hour. I have forgotten about the closing arguments.

MR. FISCHETTI: Your charge was 50 minutes.

THE COURT: I must have been out of breath.

MR. GILLEN: We will complete by Tuesday.

THE COURT: By Tuesday.

MR. RITCHIE: Yes, your Honor.

THE COURT: Tell him what do we estimate.

THE JUROR: Thank you very much.

(Juror left the courtroom at this time.

THE COURT: Have you discharged all your Brady items now? The ones you wanted me to look at?

MR. RITCHIE: I decided in keeping with your Honor's belief that Brady should be a killing experience I have given it all to defense counsel.

Except the original notes of Dorothea Tomaselli. I will give --

MR. GILLEN: The witness is already off the stand now.

THE COURT: Mr. Gillen's feeling is she didn't lay a glove on him, he doesn't care.

MR. GILLEN: That'sright.

MR. RITCHIE: That's right.

THE COURT: Of course, Mr. Leone was having fits here. He was afraid they would ask one question too many. He has been in that state for three and a half days.

MR. FISCHETTI: Your Honor called that right on the head.

MR. LEONE: I didn't know what they wanted him to say.

THE COURT: You took an awful chance.

MR. LEONE: I had to. It was obvious we were all whispering, and I didn't like to do it but I had to.

MR. FISCHETTI: I asked first, Judge.

THE COURT: It took a lot of courage.

And an acquaintance with the 302 material which Mr. Ritchie was kind enough to make available.

MR. RITCHIE: I sometimes wonder about that.

THE COURT: I think what Mr.Ritchie says si he will retain his conviction on this point until he goes to his grave.

MR. RITCHIE: I will. Until I become a defense ccunsel I'm sure.

MR. LEONE: Good night, your Honor.

THE COURT: Okay.

(A recess was taken at this time until Ocober 21, 1974 at 10:00 a.m.)

END

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 73-CR-442

JOHN DE LISO, THOMAS MC NAMARA, ALPHONSE MEROLLA and ALPHONSE M. MEROLLA, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 21, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

MICHAEL PICOZZI
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorneys for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, Federal Bureau of Investigation

(The jury is in the jury box.)

MR. GILLEN: Andrew Camarva.

A N D R E W S . C A M A R V A , a witness called herein was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. GILLEN:

Q Mr. Camarva, my name is Michael Gillen and I represent Thomas McNamara together with Mr. Meiselman.

What is your business or occupation?

A My occupation with him? When I worked for Mr. McNamara?

Q At the present time.

A Oh, at the present time I am retired.

Q From where?

A Retired from civil service and for American Barnard Corporation.

Q Do you know Mr. Thomas McNamara?

A I do.

Q Were you ever employed by him?

A I was.

Q When was that, do you recall?

A That was sometime May, June, 1972.

MR. GILLEN: May I have this marked for identification, please.

THE CLERK: Marked for identification as defendant McNAmara's exhibit BB.

(So marked for identification.)

BY MR. GILLEN:

Q What was your job with Mr. McNamara?

A I was what they call a watchman.

Q Where was that?

A In the new project he built on Nesconset, over near Jane Boulevard.

Q Did you keep notes as a watchman?

A By all means I would by Mr. McNamara and I made notes on my own decision.

Q I show you defendant's exhibit BB for identification.

Do you recognize that packet of documents?

A Yes, I do recognize it.

Q Can you tell us what they are?

A That is the man that came in --

THE COURT: No, what is the bunch of papers you have there?

THE WITNESS: Oh. These papers here, these papers I wrote. I took notes.

THE COURT: Those are your notes?

THE WITNESS: Yes.

THE COURT: While you were a watchman for Mr. McNamara?

THE WITNESS: Yes. These are my notes.

Q Could you tell us please what was the first date you were employed as a watchman on this job?

A Must have been around June, maybe the 25th, something like that. Somewhere around that neighborhood. I don't remember the date.

Q Take a look at the note and tell us if that refreshes your recollection?

A This is June 27.

Q Is it May or June?

A June. June 27.

MR. GILLEN: He is right, I am wrong.

Q June 27, is that correct?

A Yes.

Q Can you tell us, please, did you see anyone on the McNamara property on June 27, 1972?

A Yes, while I was in the trailer this man walks in and says "I am the superintendent of the construction work." Well, I don't know. I wasn't there to see the man being the superintendent. It was before I was a watchman. This man came in and said "I came over here to get the file cabinets."

THE COURT: What?

THE WITNESS: File cabinet. I said "But Mr. McNamara did not allow me for you to take this here. He didn't say somebody was coming in."

He said to me "These are not his. These are my boss', the contractor." I guess that must have been Mr. Goberman.

He took them away and I had no decision to make.

BY MR. GILLEN:

Q What was his name?

A Gary Taibbi, I think T-a-i-b-b-i. Gary was the first name. G-a-r-y.

Q What time of the day or evening did this take place?

A 10:22 a.m..

Q Was that note made at that time?

A That note was made right after he went away.

Q Are you sure it was June 27th?

A I was sure. I wouldn't have put down June 27th.

MR. GILLEN: I offer that first sheet into evidence, your Honor.

MR. RITCHIE: Objection, your Honor.

THE COURT: On what grounds?

MR. RITCHIE: May I see it?

THE COURT: Yes.

THE WITNESS: This is my handwriting.

(Pause.)

THE COURT: I think that Mr. Gillen offered only the entry to which Mr. Camarva testified.

MR. RITCHIE: Yes, your Honor.

Mr. Camarva, did --

MR. GILLEN: Does Mr. Ritchie want a voir dire?

MR. RITCHIE: Yes, may I have a voir dire?

VOIR DIRE EXAMINATION

BY MR. RITCHIE:

Q Mr. Camarva, you worked prior to June 27th?

A Did I work before that?

Q Yes.

THE COURT: For Mr. McNamara on this job.

A Yes, I worked many different places as a machinist.

THE COURT: For Mr. McNamara on this job that you worked --

THE WITNESS: No.

THE COURT: Listen. On any date earlier than June 27th?

THE WITNESS: No.

THE COURT: That was your first date on the job?

THE WITNESS: On the first day, yes, I believe

that or the day before. I think it was the first day. I said to myself, the first day on the job and they are taking things away.

BY M R. RITCHIE:

Q You testified, you believe you started on June 25th, is that right?

A I can't remember. It's two years ago. I have certain papers -- I am not quite sure, maybe I got them saved to show the day I worked. I am almost sure this might have been the first day that I worked for Mr. McNamara and this man came in and I told him "Listen, this is my first day." I told Gary "What are you going in to take the stuff? Mr. McNamara never told me anything." He said "These are my boss'," and he took them away.

Q You just said at the beginning of the answer it may not have been your first day and you told Mr. Taibbi it was your first day?

A I don't remember now.

Q This may not have been the first day you worked?

A Yes.

Q It is the first day you have any notes?

A Yes.

Q If you had worked the day before --

A That means that is the day I worked because I

usually made notes. I always made notes.

Q If nothing happened the day before, you would have no notes?

A That must have been the first day then.

Q What day did you start? What day of the week?

A I don't remember.

Q Would it have been a Monday?

THE COURT: He said he doesn't remember.

THE WITNESS: If I did, I would say right off-hand. No use me guessing. I like to tell you the truth.

MR. RITCHIE: I object to this on certain grounds I would like to take up at a side-bar.

(The following took place at side-bar.)

THE COURT: Yes sir?

MR. RITCHIE: My only objection to this is the Taibbi notes are not in evidence, I didn't offer them because your Honor ruled they would not be admitted into evidence.

THE COURT: I don't know if I did or not.

MR. GILLEN: I wanted to offer part of his notes and Mr. Ritchie objected.

MR. RITCHIE: Well, then I will withdraw my offer except for the fact that he states it has been used.

THE COURT: I don't think they go beyond anything he said testimonially, what difference does it make?

MR. RITCHIE: Fine.

(The following took place in open Court.)

THE CLERK: Now defendant McNamara's exhibit BB in evidence.

(So marked in evidence.)

DIRECT EXAMINATION

BY MR. GILLEN: (Continuing.)

Q I show you defendant's exhibit BB in evidence which you said was your notes.

You have on the time, 10:22, Tuesday, June 27th, 1972, is that correct?

A That is correct.

Q Looking at that --

MR. RITCHIE: Excuse me. If I may I believe that should be marked BB-1 or BBC or something.

THE COURT: It happens to have the BB tab on it. The others are not marked. Why don't we leave it that way.

Q Mr. Camarva, I will repeat the question, you have on this note, time 10:22 a.m., Tuesday, June 27th, 1972.

A That's right.

Q Was it Tuesday at 10:22 when you made that note?

A Yes.

Q Or maybe 10:23 or --

A No, I wouldn't put it there if it wasn't.

Q Did you look at your watch?

A Yes.

Q Is there any doubt in your mind looking at the note that this is the first day you worked?

A I believe it is.

Q Without it, you wouldn't be able to remember if you started on the 25th, 27th or 28th?

A That's right. This is the day I believe I started, otherwise I would have had another note.

Q If you started on the 26th, would you have a note on the 26th?

A I would have.

MR. GILLEN: Nothing further.

CROSS-EXAMINATION

BY MR. RITCHIE:

Q Mr. Camarva, how old are you?

A 79.

Q When did you retire from civil service?

A Retired from civil service in 1945.

Q What have you been doing between 1945 and the time --

A Working for St. Barnabas Hospital for Incurable Diseases, 183rd Street up in the Bronx for two and a half years. I was chief machinist and also assistant to Mr. Casell (phonetic) who was the chief engineer. The reason I left, I had no social security and I retired. I told the chief, and the chief said "Too bad Andy, I would resign myself if I didn't have 22 years." I worked another job as a machinist. This was on 6th Street and Third Avenue in Brooklyn. I had a Navy chief on an excrusion machine. I did jobs on drills and tapping holes, and so forth. I also worked for the American Corporation, April 9, 1951. I retired in '65 which they did in fact retire me '66 because I had to do work for somebody else to do my kind of work for the engineers. Retired December 1, 1961. From then I worked here and there in order to live.

Q Have you ever been a watchman?

A Yes, sure.

Q How many occasions?

A I was a watchman on that golf course on South Nesconset --

Q When was that?

A Nesconset Highway and what was that, Arrow Road?

Right after the Fox Theater. There is an 18-hole golf course. I was what they call a watchman. I worked for some engineers located in the Indianhead Road.

Q How long were you a night watchman?

A I don't remember now. This is quite a long time. Way back in 1961 or '62.

Q That is your only experience?

A I also worked as a watchman but I wasn't exactly a watchman, I was answering telephones for The Big Apple Corporation. The IBI. They gave me a uniform and all that. I used to answer telephones when the manager would say, tell me, Mr. Baker is going to store number so-and-so, and Mr. White is going to store number so-and-so, and I used to make notations. And write everything down. That is it. I worked in everything where a buck was a buck, you know.

MR. RITCHIE: I have no further questions.

REDIRECT EXAMINATION

BY MR. GILLEN:

Q How did you get this job?

A Mr. McNAmara's job? I applied for it. I never waited for the newspapers to give me a job, I applied.

Q Did you ever know Mr. McNamara before that?

A No.

MR. RITCHIE: I object.

THE COURT: You are excused, Mr. Camarva.

THE WITNESS: Thank you very much.

(Witness excused.)

MR. GILLEN: James McNamara, please.

J A M E S M C N A M A R A , a witness called herein, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. GILLEN:

Q Mr. McNamara, are you the son of Thomas McNamara?

A Yes, I am.

Q I show you defendant's exhibit AZ-1 in evidence, look at that check please, and tell us if you recognize it?

A Yes sir, I do.

Q Does your signature appear on that check?

A Yes.

Q Tell us please, did that check ever come into your hands?

A Yes.

Q When?

A On the 28th of June.

Q What did you do with it?

A I took it up to the Marine Midland Tinker Bank.

Q What did you do with it?

A Cashed it.

Q What did you do then?

A Took the cash back to the automobile agency downtown.

Q What did you do with the cash?

A Gave it to my brother John.

Q Did you give him any other cash other than $20,000?

A Yes, we also took $5,000 out of our cash from the premises.

Q You had cash in the safe on the premises?

A Yes.

Q How much money in total did you give your brother John?

A $25,000.

Q Can you tell us, please, do you know where did John go after you gave him that cash?

A He took the cash I gave him and proceeded down the hall which is outside my apartment.

Q You had an apartment on June 28th?

A Yes.

Q In the McNamara premises?

A Yes, Upstairs.

Q Will you describe that for the jury, please?

A It is two rooms in the front of the building. Actually the side facing the water. And the office which I also have down there which is another office for the agency at the time is in front actually there is an entrance and exit to the hall and my apartment is on the other side.

Q You saw your brother go into that office with the money?

A Yes.

MR. GILLEN: Nothing further.

MR. RITCHIE: Any other questions?

CROSS-EXAMINATION

BY MR. RITCHIE:

Q Do you know Al Merolla?

MS. SELTZER: Objection.

THE COURT: Overruled.

A Yes, I do.

Q Do you know Angelo Merolla?

A Yes.

Q Do you know Rocky Merolla?

A I couldn't identify him.

Q Do you know any other brothers of Angelo Merolla?

A Again, I couldn't identify them.

Q Do you know that he has other brothers?

A Yes, I do.

Q Do you know if the other brothers were on the McNamara Buick-Pontiac premises?

A I couldn't say for certain. I understand they came in for service which is my department in the agency. I really never talked to them.

Q Your brother went into your apartment?

A In my office which is through my apartment. There are two entrances.

Q Do you know who else was in the apartment at the time he went down?

A No, I don't really.

Q Do you know John DeLiso?

A No.

Q Did you ever see that $25,000 in cash?

A Did you ask did I?

Q Yes.

A Yes.

MR. RITCHIE: I have no further questions.

MR. GILLEN: No questions.

MR. LEONE: No questions.

MR. FISCHETTI: No questions.

THE COURT: You are excused.

(Witness excused.)

THE CLERK: Yes, thank you.

K E N N E T H B R O W N , a witness called herein, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. MEISELMAN:

Q Mr. Brown, did there come a time in 1972 when you were employed to do work on a project, a building project on Nesconset Highway?

A Yes sir.

Q Who hired you?

THE COURT: Would you talk into the microphone?

A Harry Goberman.

Q When you were hired by Harry Goberman, were you told by him as to -- was anything said by him with reference to any company you were working for?

A Yes, for Len-Al Construction.

Q And in what capacity were you employed, Mr. Brown?

A Laborer.

Q How long did you work there, if you remember?

A About three months, two and a half.

THE COURT: About how long, srsir?

A Two and a half, three months.

Q Did there come a time, Mr. Brown, when you were

working on the job and cement and concrete was being poured for the entrance to the service area?

A Yes.

Q Do you recall that day?

A Yes sir.

Q Do you recall whether on that day you had occasion to -- withdrawn.

Do you know Mr. Thomas McNamara?

A Yes, sir, I do.

Q Do you know Harry Goberman?

A Yes.

Q Do you recall on that day while the concrete was being poured whether you had occasion to see Thomas McNamara and Harry Goberman?

A Yes, I did.

Q Where did you see them on that day?

A They were just outside the doorway. They sent me out of the building where they were pouring concrete because I didn't have the proper boots. I went out to get the boots and Harry and Mr. McNamara were there. Or Mr. Goberman and Mr. McNamara were there.

Q Could you hear what they were saying?

A No.

Q Would you tell us what conditions were on the

job at the time with respect to noise?

A It was pretty noisy. There was a cement truck, bulldozer, and a lot of people.

Q Did there come a time when you observed Mr. McNamara and he looked different than he usually did?

A When he left he did. They got done talking and he left and looked differently, a little upset when he left.

Q What was he doing?

A He was washing his face.

Q Did you speak with him?

A Yes.

(Continued on next page.)

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Q What, if anything, did you say to him, Mr. Brown, and what, if anything, did Mr. Mc Namara say to you?

MR. RITCHIE: Objection, your Honor.

THE COURT: He may answer.

Q Go ahead, sir.

A I asked him what happened, and he said that he spit in my face, and that is it.

Q You may inquire.

CROSS EXAMINATION

BY MR. RITCHIE:

Q For what period of time did you work on that job site?

A It was in the Spring of '72.

Q Do you know what month you started and what month you finished?

A Sometime around March, I would say.

Q Do you know when you finished working there?

A Sometime in June, I don't know the exact date, no.

Q Was it prior to or subsequent to June 5th?

A It was about that time, I don't know, you know, if it was the fifth or the sixth, I don't know.

Q Where was this concrete being poured?

THE COURT: What is the question?

Q Where was this concrete being poured?

A It was being poured in the service area of the building.

Q The interior or exterior?

A The interior.

Q And did you have occasion to speak to Harry Goberman after this incident that you have related?

A No, I didn't.

Q Do youknow what, if anything, did happen to Harry Goberman?

A No.

Q Do you know what, if anything, Mr. Thomas Mcnamara had said to Harry Goberman?

A No.

Q Do you know if, in fact -- I will withdraw that.

Did you in fact, see Mr. McNamara and Mr. Goberman speaking at the time they were speaking, did you see Mr. Goberman spit at Mr. McNamara?

MR. GILLEN: Objection, your Honor.

MR. FISCHETTI: It is two questions, objection.

Q Did you see Mr. Goberman spit at Mr. McNamara?

A No, I didn't.

Q The only thing you know is what Mr. McNamara told you?

A Yes, yes.

Q Now, did you ever see Harry Goberman assault Mr. McNamara?

A No, sir.

Q Where do you work now?

A Suffolk County Water Authority.

Q What do you do there?

A Relief operator, plant operator.

Q When did you start working there?

A July of '72.

MR. RITCHIE: I have no further questions, your Honor.

MR. MEISELMANN: One question, sir.

REDIRECT EXAMINATION

BY MR. MEISELMANN:

Q Were you ever interviewed by any agents or officer of the United States Government?

A No, sir.

MR. MEISELMANN: Thank you.

MR. RITCHIE: I have one more question.

RECROSS EXAMINATION

BY MR. RITCHIE:

Q Mr. Brown, did you ever see any incidents of violence or threats between Mr. McNamara and Mr. Goberman?

A No, sir.

MR. RITCHIE: No further questions.

MR. MEISELMANN: Thank you, sir.

THE COURT: You may step down, Mr. Brown.

(The witness was excused.)

MR. MEISELMAN: The defense calls Mr. James Freda.

J A M E S F R E D A , called as a witness on behalf of the defendant, McNamara, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. MEISELMAN:

Q Mr. Freda, what was your occupation in 1972?

A Operating engineer.

THE COURT: What, sir?

THE WITNESS: Operating engineer.

Q As an operating engineer, what do you do?

A I run heavy equipment.

Q Such as a bulldozer or a back hoe?

A Yes, sir.

Q Did there come a time in 1972, when you were employed to work on a project that was then being constructed on Nesconset Highway?

A Yes, sir.

Q Who hired you?

A Harry Goberman.

Q At the time you were hired, was there any discussion as to whom you would be working for?

A Yes, there was.

Q And what was that discussion, sir?

A Lenal Construction

Q And did Mr. Harry Goberman tell you what, if anything, his connection was with Lenal Construction?

A He told me he was one of the partners.

Q Now, at the time you were employed, did you have any conversation with, or thereafter, did you have any conversation with Mr. Goberman concerning his doing the work on the job?

A When I first originally started the job, it was Lenal, then later on, when he finally called me, he said that he was doing the job, and his brother was with him, and would I be a supervisor on the job.

Q And did he have any discussion with you concerning his capital?

A Yes, sir, he did.

Q What was that?

A He told me had $50 in the bank.

Q Did there come a time that you were hired as a bulldozer operator?

A Yes, sir.

Q And did there come a time when you had a conversation with Mr. Goberman concrning your being employed as a superintendent?

A Yes, sir.

Q Will you please say what that conversation was?

MR. RITCHIE: Objection, your Honor, hearsay.

THE COURT: Overruled.

THE WITNESS: Do I?

MR. MEISELMAN: You can answer the question, sir.

A Harry called me and he asked me, would I be a super on the job, I told him I don't know anything about being a super. He told me "Don't worry about it" --

THE COURT: What was that?

A He told me, "Don't worry," he said, "Don't worry about it, it's just a like a watchman."

In other words, I would see what material came on the job, and that was about it.

Q And did you act as a superintendent on thatjob, sir?

A Yes, sir, for about two weeks.

Q And thereafter, were you replaced by anybody?

A Yes, sir.

Q By whom, sir?

A Izzy Goberman.

Q Do you know the relationship, if any, between Izzy Goberman and Harry?

A They are brothers.

Q By the way, before working on this job, had you worked for Lenal Construction before?

A Yes, sir.

Q Now, were you also doing welding on this job?

A I did some, yes, sir.

Q What were you welding?

A Well, mostly mistakes.

Q And did you ever do anything with the steel beams?

A Yes, sir.

Q Would you describe for his Honor and the jury, what you did on these steel beams?

A Well, the beams were put up by ironworkers, they would be short, the beams were resting on the face breaks, which has no strength at all, and I would add on the steel so that they would go into the bury wall.

Q And did you have anything to do with the exhaust system which was being installed?

A Yes, I did.

Q Would you describe that, sir?

Q Well, I remember I was running the back hoe at the time, and it was digging a hole to lay the pipe down.

Q And while you were doing that, did you have occasion to be present at a conversation between Mr. Thomas McNamara and Mr. Harry Goberman?

A Yes, sir.

Q And can you recall what was said in that conversation by the parties?

A Well, when it came to the end of the pipes, I needed a riser to go up to the sand, and it wasn't there, so Mr. McNamara asked Harry where the pipe was, and Harry kept on stalling, saying it's coming, and this went back and forth several times, and there was angry words, you know, and Harry said he would bury Mr. McNamara in the hole that I had dug.

Q In the hole that you had dug?

A Right.

Q Do you remember another occasion, Mr. Freda, when concrete was being poured at or near the entrance to the service entrance of the building?

A Yes, sir.

Q And what were you doing on that day?

A Well, I was with the machine, I was cleaning some garbage or something, among my other jobs, and there was this concrete truck that got stuck and I pulled it out, --

Q How long have you been in construction?

A About ten years.

Q Did you have occasion to observe the concrete at that time?

A Yes, sir.

Q Would you describe it, please?

A The concrete was very soupy, which is, you know, not good for it, and there was a lot of traffic going to go.

Q Did you, at that time, observe Mr. Thomas McNamara, and Mr. Harry Goberman?

A Yes, I did.

Q Would you please state for the Court, what you observed?

A Well, I saw an argument back and forth, I couldn't hear, I was running the machine, naturally.

At one time during the heated argument, Harry spit in Mr. McNamara's face.

THE COURT: Did what?

THE WITNESS: Spit.

Q Do you recall an occasion, Mr. Freda, when you were in the oncstruction trailer in the presence of Harry Goberman and Allan Goberman, and there was discussion concerning a shop steward?

A Yes, I do.

Q Would you please relate, to the best of your

recollection, what was said?

A Well, Harry and Alan --

MR. RITCHIE: Objection, your Honor.

THE COURT: Yes, I don't quite see the relevancy of this.

BY
MR. MEISELMAN:

Q Did there come a time, Mr. Freda, when this job came to a stop?

A Yes, sir.

Q And can you tell us approximately when that was?

A Around the middle of June, as far as I remember.

Q At the time it came to a stop, and I show you Defendant's Exhibit D in evidence, I ask you whether you saw that?

A Yes, I did.

Q Where did you see that?

A On the temporary door that was the building entrance, the building was boarded up and there was a temporary entrance, sir.

Q After the job came to a stop, Mr. Freda, did you have employment at this job site?

A Yes, sir.

Q What?

A I was a night watchman.

Q By whom were you employed?

A Mr. McNamara.

MR. MEISELMAN: You may inquire, sir.

(Continued on next page.)

AM R2

Q Mr. Freda, what is your present occupation?

A The same, Operating Engineer.

Q Operating Engineer?

A Yes, sir.

Q By the way, my name is David Ritchie. I represent the Government in this case.

A All right.

Q Have you ever testified previously in this case?

A No.

Q You were present when Thomas McNamara was told by Harry Goberman that he would bury him in the ground; is that correct?

A Yes, sir.

Q That was in connection with the exhaust pipe, wasn't it?

A Yes, sir.

Q And you were present, were you not, and Mr. McNamara was present and Mr. Goberman was present?

A Right.

Q What were you doing at the time?

A I had just finished digging a hole and the machine was shut up, so you know, I listened and watched.

Q Were you standing with them?

A Standing close enough to hear.

Q Well, where were they in relation to you?

A Like from here to the table (indicating).

Q Did you see them?

A Yes, sir.

Q Did they see you, if you know?

A Yes, sir.

Q And when Harry Goberman said this, was there any reaction, did you see any reaction on Mr. McNamara's face?

A I did, I did, there were arguments constantly going on, but that I never heard, but they was telling me about it.

Q Pardon me?

A They were arguing constantly between Mr. McNamara and Harry that I never heard because I was running the machine, but I would keep an eye on Mr. McNamara because his health, you know, from the time I met him, and I just kept an eye on him.

Q You have previously worked for McNamara?

A Yes, sir.

Q Now, did Mr. McNamara say anything to you after Mr. Goberman threatened him?

A No. I talked to him. I went to see if he was all right.

Q Was he all right?

A Yes, sir, excited.

Q What did Mr. McNamara say in the course of this conversation with Mr. Goberman?

A Harry walked away as soon as he said that. He was walking away.

Q What had Mr. McNamara said previously?

A They was just arguing back and forth, you know, get the pipe and not getting the pipe, getting the pipe and not getting the pipe.

Q Would you characterize it as a heated argument?

A Yes, I guess so.

Q Now Harry said he was going to bury Mr. McNamara in the ground; is that correct, in the hole you had dug?

A The trench I had dug.

Q And he said he would do that?

A He said he would, yes.

Q And then what happened?

A And he walked away.

Q And at that time that he said it, did he do anything to Mr. McNamara?

A No, he said it and walked away.

Q He walked away?

A Yes, sir.

Q At the start of the installation of the exhaust

system, did Mr. Thomas McNamara get pushed by Harry Goberman?

A Starting the installing?

Q At the time that you were installing this exhaust system, was Mr. McNamara pushed by Harry Goberman?

A No, sir, he wasn't.

MR. GILLEN: Your Honor, I must object to this alleged reading from a document --

MR. LEONE: Your Honor, he is reading from something.

MR. GILLEN: He is reading something. I don't know what it is.

(Mr. Ritchie then placed the document on counsel table.)

BY MR. RITCHIE:

Q Was he kicked by Mr. Goberman?

A At the trough when we were digging the trench?

Q Yes.

A No.

Q Was he hit by Mr. Goberman?

A No.

MR. RITCHIE: I have no further questions, your Honor.

MR. MEISELMAN: One question.

REDIRECT EXAMINATION

BY MR. MEISELMAN:

Q Were you ever interviewed by any officer or agent of the United States Government?

A No.

MR. MEISELMAN: Thank you.

MR. GILLEN: Gene Brosi.

THE COURT: You may go, Mr. Freda.

MR. GILLEN: Thank you.

(The witness was excused.)

E U G E N E W. B R O S I, called as a witness on behalf of the defendant Thomas McNamara, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GILLEN:

Q Mr. Brosi, my name is Michael Gillen. I am co-counsel for Mr. Thomas McNamara.

Tell us, please, whom you are working for.

A Suffolk County Police Department.

Q How long have you been so employed?

A I am there in my ninth year.

Q Now, did there come a time, sir -- I will withdraw

that.

Referring you in time to the period April to June of 1972, did you have employment other than at the Suffolk County P.D.?

A Yes, I did.

Q What was that?

A I worked for Harmac Construction, Harry Goberman.

Q Is it permissible that you have side jobs with the Police Department?

A Yes, sir, it is.

Q Is that commonly called moonlighting?

A Yes, it is.

Q Where did you work for Harry Goberman?

A At the job site of the McNamara Buick dealership on Nesconset Highway, Port Jefferson Station.

Q What did you do?

A I started off as a watchman. We had gotten a call up there about some union problems and Mr. Goberman was worried about some iron workers who were irate about him having unloaded a load of steel without using union men, and at that time there were a lot of men at work and Mr. Goberman had said they are drinking at the bar nearby. He was afraid they were going to knock the walls in as they weren't tied in with steel yet.

Q When was this?

A Early May.

Q Do you know Mr. Thomas McNamara?

A Yes, I do.

Q And would you point him out, please?

A That gentleman in the back next to the lady.

MR. GILLEN: Let the record indicate that Mr. McNamara has been indicated by the witness.

BY MR. GILLEN:

Q Do you know a Mr. Harry Goberman?

A Yes, I do.

Q Was Mr. Goberman Harmac Construction?

A Was Goberman Harmac Construction?

Q Yes, sir.

A As far as I know, I assume that Harmac meant, you know, Harry and Mac. I didn't know anything other than that.

Q Did you ever hear any threats by Harry Goberman against Mr. McNamara?

A Yes, I did.

Q What and when and where?

A When we were in the trailer. It was prior to pouring the building, Mr. McNamara left the trailer after an argument about which I don't recall the essence of it, but as he was leaving Mr. Goberman said, "I should have" -- "I am

going to finish the old bastard. I'll hit him in the head with a pipe."

Q Anything else?

A One time, just before we were going to pour the floor of the building the roof was leaking, and if you are going to pour cement and the roof is leaking, well, it drips on the cement and ruins the finish. We went up to investigate why it was leaking, and we found the puddle was in the middle of the roof instead of dripping over, offside, which would show that it was lower on the side, so it would run off the side, and it wasn't, and they talked about it, they argued about it for awhile, and Mr. Goberman came up with the suggestion that he would put an interior roof drain at the low point in the roof so the water would run down through a pipe into the building and out the side walls through the upper ceiling, an inner pipe to alleviate the problem of the water laying on the roof.

As we were leaving the roof after this was mutually agreed on, Mr. McNamara descended first on the ladder and he was backing down and was about halfway down and Mr. Goberman said, "I should have pushed the old fuck, that would solve everything."

Q Were you ever questioned by any FBI agent of the Government?

A Never.

Q Incidentally, you said you were a police officer; is that right?

A Yes, sir.

Q Did you ever arrest anybody?

A I make a lot of arrests.

Q Did you arrest anybody on the McNamara job for all of these arguments?

A No.

MR. GILLEN: All right, nothing further.

MR. RITCHIE: Any other questions?

MR. FISCHETTI: No.

MR. LEONE: No.

(continued next page)

Q Now, on the roof, is it your testimony that Thomas McNamara was halfway down the ladder at the time that Harry Goberman said that to you?

A I couldn't see how far down. I assume it was halfway down by time and motion. I assumed he was about halfway down.

Q And what was said to you was, "I should have pushed him off." Is that what was said?

A No, sir, that is not what was said.

I could quote it again. I don't want to use profane language --

Q We don't have to use that. I think we both, you and I, don't want to.

A Okay.

Q But in essence it was, "I should have pushed him over"; is that right?

A That is right, sir.

Q Did he make any attempt to push him off?

A No.

Q Was Thomas McNamara on the roof at the time that Harry Goberman said that?

A He was on the ladder.

Q Was he on the roof?

A He was on the ladder, no, he was on the ladder, n

the roof.

Q He was halfway down?

A Yes, sir.

Q And it was said to you and not to ThomasMcNamara?

A It was said to me, not to ThomasMcNamara.

Q Now, I think you testified to another threat on the life of Thomas McNamara; is that correct?

A Well, I don't know if it was on the life. It was to do bodily damage, as far as I could say.

Q To hit him over the head with a pipe?

A Yes.

Q Okay. Now, where was that said?

A In the trailer.

Q Who was it said to?

A It was said -- I don't know to whom. It was in front of me because it was said so that I could hear it and we were the only two in the trailer.

Q You were the only two in the trailer?

A Yes.

Q Where was Thomas McNamara?

A He was across the field in front of the dealership from the trailer. He had left the trailer. They had had an argument prior to that.

Q At the time that he told you -- well, at the time

that he made those two statements, at either time was Thomas McNamara present?

A No, he wasn't.

Q And on neither of those two occasions was Mr. Goberman aware of the fact that you were a police officer?

A He was aware, sure.

MR. RITCHIE: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GILLEN:

Q Did you tell Mr. McNamara about these threats?

A At a later date, not at that time. Nobody knew -- or I shouldn't say that. I didn't know any background. I didn't know Mr. Goberman and I didn't feel that the threats were in imminent danger to him. I thought it was an argument, in the heat of argument.

Q Did there come a time when you came to learn the background of Mr. Goberman?

A You will have to repeat that. I didn't hear you.

Q Did there come a time when you came to learn the background of Mr. Goberman?

MR. RITCHIE: Objection, unless he fixes a date, your Honor.

THE COURT: No.

Did there come a time before or after?

BY MR. GILLEN:

Q After the threats.

A Yes, sir.

THE COURT: Was that the first time that you learned about Harold Goberman's background?

THE WITNESS: No, no, I didn't know anything about it at the time. I didn't until some weeks after, after, I guess it was, after the job was even shut down. There was nothing said to me by any police officers or any agency or anybody as to the background of Mr. Goberman at that time.

Q What about after the job was shut down? Did you learn anything of the background of Harry Goberman?

A Yes, I did.

Q Did these threats then take on added importance?

MR. RITCHIE: Objection, your Honor.

MR. GOBERMAN: I will withdraw that, your Honor.

THE COURT: Yes.

BY MR. GILLEN:

Q Was it after you learned of the background or -- I will withdraw that.

Did you inform Mr. Thomas McNamara of these threats after you learned of the background of Harry Goberman?

A Yes, I did.

MR. GILLEN: Nothing further.

MR. RITCHIE: One more question, your Honor.

RECROSS-EXAMINATION

BY MR. RITCHIE:

Q So it is your testimony that it wasn't until after the job was shut down that Thomas McNamara ever knew that his life had been threatened by Harry Goberman?

MR. GILLEN: Objection, your Honor.

MR. FISCHETTI: Objection, your Honor.

THE COURT: No.

Knew from?

MR. RITCHIE: From him.

Q Knew from you?

A Yes, sir.

MR. RITCHIE: No further questions.

MR. GILLEN: Thank you.

(The witness was excused.)

MR. GILLEN: The defendant Thomas McNamara rests, your Honor.

MR. FISCHETTI: May we have a side bar?

THE COURT: Yes.

We will have a short recess at this time.

Members of the jury, please don't discuss the

case with one another or with anyone not on the jury until it is given to you to determine.

(At 11:00 o'clock A.M. the jury left the courtroom.)

MR. FISCHETTI: Judge Dooling, the defendant John DeLiso was prepared to rest at this time. However, prior to resting I want to call the attention of the Court to that which I had said previously and which I would say again now on behalf of John DeLiso, and I move, your Honor --

THE COURT: Yes?

MR. FISCHETTI: (Continuing) -- that your Honor tend some instruction to the jury that Angelo and Rocco Merolla were acquitted for acts that in fact the Government's main witness, Mr. Goberman, has charged from this witness stand.

I do it on the basis again that Mr. Ritchie in his opening did mention Angelo and Rocco as being those who witnessed and had joined in the beating and were present on both occasions, and further that the Government's main witness, Mr. Goberman, did testify again that Angelo and Rocco participated in the beating to some extent and that they were conspirators, if not participants.

Now I have spoken to Mr. DeLiso about this and it is my feeling, one, that I am entitled to this instruction,

or, in the alternative, if your Honor does not wish to give this instruction, that I am entitled to bring it out either by a witness or on summation myself. I think that it is better that the jury, rather than going on things that they did not know, learned the true facts in the matter for whatever worth they are either to the prosecution or the defense, I think the case should be determined on all the facts in the case, and right now I believe that they must because of the presentation of the Government's case speculate to some extent as to what had happened to Angelo and Rocco.

Again I stress that their names were brought out by the Government in its opening and through their witnesses, and I think we are entitled to have them instructed that they were acquitted at the prior trial.

Your Honor well knows that during the examination of the witnesses, the prior trial and prior proceeding was brought to the fore on many, many occasions; in fact, I think Mr. Ritchie this morning asked one of the witnesses did he testify at the prior trial knowing full well that he didn't testify at the prior trial, having the record.

That is the basis of my motion, sir, and I press it at this time prior to John DeLiso resting.

MR. RITCHIE: Your Honor, the Government would

oppose that motion.

THE COURT: Just a minute.

Yes, sir?

MR. RITCHIE: Your Honor, the Government would oppose that motion.

I would like to note, of course, that the Government in itsopening made reference to the presence of Angelo and Rocco Merolla, and that it necessarily must if it is to present a full and fair and accurate picture of the allegations, so their presence must be noted.

With reference to references to the prior trial, I would just like to state that the prior trial was arought into this case not by the Government --

THE COURT: It was inevitable --

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MR. RITCHIE: (Continuing) Not by the Government but by Ms. Seltzer at the time of questioning, I believe, Gary Taibbi, I may be wrong.

THE COURT: It was inevitable.

MR. RITCHIE: Yes.

Your Honor, the Government attempted to keep that out. I would submit, your Honor, that to advise the jury of the acquittal of Angelo and Rocco Merolla, while it may have some benefit to one side or the other, that fact is by itself totally irrelevant to the issues in this case. The fact of an acquittal is not evidence and should never be considered evidence. It is merely the opinion of twelve individuals; it is a very powerful opinion because it is the opinion of twelve like individuals to the twelve individuals who must decide this case.

Your Honor, because the Government has alleged a conspiracy and because the Government has alleged co-action on the part of the four presently tried defendants, the severed defendants and the two acquitted defendants --

THE COURT: Does anybody have any authority, which I think there was mention in passing last time?

MR. RITCHIE: At the present time I don't have any authority, your Honor.

THE COURT: Surely this question must have come up

a hundred and forty thousand times in cases somewhere.

MR. RITCHIE: I am sure, I am sure.

Are we going to be finished by one o'clock?

THE COURT: I have no idea.

MR. GILLEN: Sure.

THE COURT: I haven't heard from Mr. Leone or Miss Seltzer yet.

MR. GILLEN: It is a safe bet that we will be finished.

MR. LEONE: I think as far as I am concerned I am going to rest, but --

MS. SELTZER: Yes, sir.

MR. LEONE: Just one thing and that is something I have been asked to discuss with counsel, and that is by one of the defendants, so I would like to have an opportunity to do that.

THE COURT: To do what?

MR. LEONE: I would like before I officially say I rest, and I don't think Miss Seltzer knows what I am referring to --

MS. SELTZER: I think I do.

MR. LEONE: That means she talked to someone, so I would just take afew minutes and then inform the Court.

THE COURT: Then let us have a short recess at this

point.

Meanwhile, would you see if you can wrack your brains and see if you know of any case?

MR. RITCHIE: Your Honor, if I may:

If we are going to have Ms. Seltzer resting also, the Government will not be prepared at this hour to present a rebuttal case. I will be prepared at 2:00 o'clock to present a rebuttal case.

MR. GILLEN: We are prepared for summation.

MR. MEISELMAN: I didn't hear that last statement.

MR. RITCHIE: The timetable that had been indicated was that the Government would have until tomorrow morning to present a rebuttal case.

THE COURT: Now you can get finished on this case and get through with it that much sooner.

MR. RITCHIE: I would love to, but I would like until two o'clock today to present rebuttal. I have a witness.

THE COURT: All right, all right, we can during that time look at the charge.

Mr. Fischetti.

MR. RITCHIE: Since John DeLiso will rest at that time, I would ask the Court to ask Mr. Ritchie to make an offer of proof as to what type of rebuttal witness he is going to call and whether that rebuttal in any

manner, shape or form would be improper in view of DeLiso not offering any affirmative evidence.

MR. RITCHIE: It wouldn't be directed towards Mr. DeLiso whatsoever. It would be directed towards --

THE COURT: It would be what?

MR. RITCHIE: It would be directed --

MR. LEONE: I would join in that request.

MR. RITCHIE: It would be directed towards the case presented by Mr. Gillen this morning.

MR. FISCHETTI: I may well object. I just asked for an offer of proof.

THE COURT: What do you mean? It will be with reference to what?

MR. RITCHIE: It would be with reference to Mr. McNamara's statements or lack of statements thereof concerning threats.

MR. GILLEN: I thought that was on the direct case, your Honor.

MR. FISCHETTI: That is right.

THE COURT: I thought it was in there.

MR. GILLEN: I am sure it is because Agent McMullen testified in detail.

MR. RITCHIE: I am talking about Detective Sergeant Creighton.

THE COURT: Who?

MR. RITCHIE: Detective Sergeant Creighton.

THE COURT: What is his name?

MR. RITCHIE: Creighton, Creighton, C-r-e-i-g-h-t-o-n.

Are we going to have a recess now?

THE COURT: Yes.

MR. RITCHIE: Perhaps I can think about it for ten minutes and then make a decision.

THE COURT: All right.

MR. FISCHETTI: Thank you, sir.

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(The following took place outside the presence of the jury).

THE COURT: Yes?

MR. RITCHIE: I must say, I haven't been able to find any authority directly on point.

MR. FISCHETTI: We have another problem.

MR. LEONE: We spent our time in a meeting in one of the witness rooms to decide whether we will go forward with anything.

At this time, on behalf of Alfonse Merolla, we rest.

THE COURT: What is that?

MR. LEONE: On behalf of Alfonse Merolla, we rest.

MS. SELTZER: Alfonse M. Merolla will also rest. And I concur in the argument made by Mr. Fischetti as far as advising the jury --

THE COURT: Both feel that the jury should be advised --

MR. LEONE: I am not prepared to say that.

THE COURT: You needn't say it.

MR. LEONE: The problem we have is the inference might be, and here is the danger, the inference that might be that they were in fact found guilty.

That's all.

THE COURT: There is no absolution we could use and which would not be an untruth, perhaps. I don't know, I suppose it would be introduced in a kind of civil side concept. We could say flatly the case of John McNamara, Alfonse -- no, Angelo Merolla and Rocco Merolla have been severed. And none of these is available as a witness to either side.

MR. FISCHETTI: That is not true.

MR. LEONE: Wait a minute.

THE COURT: On the civil side, we usually have one judgment per case. You can't enter a judgment less than -- except by some express provision of law in a civil case. Usually, you have to sever in order to enter a judgment whether for or against the particular party, in the absence of a total disposition of the case.

Because you see, here you say if they are acquitted, you are in effect saying that on this same evidence, or presumably on this same evidence, another jury evidently disagreed with everybody else, and absolutely, it's clear that the government has failed to prove a case against Angelo and Rocco Merolla beyond a reasonable doubt.

And Angelo's name has been all over the case, and

Rocco to some extent has been in and out of the corridor.

I think it would be hard for a jury to see why Rocco should have been acquitted, and John De Liso not. Apparently one or the other was the man in the corridor. If you are going to be uncertain as to one you ought to be uncertain as to both.

If, on the other hand, you convict as to one, it would seem you have to acquit as to the other. That would be the effect.

But it seems to me what you are really doing, offering an opinion represented in a verdict that the Government has failed to establish beyond a reasonable doubt that either Rocco or Angelo were shown to have been a conspirator as alleged.

MR. FISCHETTI: Your Honor could instruct the jury, as your Honor did say the last time we discussed it, that the verdict in the other case of guilty had nothing to do with this case. Your Honor, I for one, would be quite concerned, if a jury came into the Court and found my client guilty, and upon speaking to them, learn perhaps one of the reasons they did so was because they thought Angelo or Rocco had been found guilty of the same crime. I don't know why we have to hide it. They know there was a prior trial.

They know Angelo and Rocco was there, from the Government. I did not mention it at all.

THE COURT: You can't blame anybody for that. It would be impossible to try this case, without the fact of the earlier trial and the participation --

MR. LEONE: My recollection is -- and I don't think I am incorrect -- on the direct of Mr. Goberman, Mr. Ritchie asked Mr. Angelo Merolla to stand up. Angelo was in the courtroom, and Mr. Harold Goberman pointed to him and said he is in the room.

I again go to the record but --

MR. RITCHIE: He identified him.

THE COURT: It doesn't matter. He identified Mr. Angelo Merolla and M r. Rocco Merolla as having been present. They were either not indicted or were indicted.

If they were indicted, something happened.

MR. FISCHETTI: With them being present, he did testify one or both of them did beat him on --

MR. LEONE: Either the fifth or the twenty eighth.

MR. FISCHETTI: There is no question. The state of the record here is what we are going to do is allow these twelve people to go into the jury room and deliberate and speculate.

THE COURT: Would you see if Miss Adamo is finished?

What did we decide to do with the indictment, leave in or out --

MR. FISCHETTI: It was excised.

THE COURT: Well, if we are going to do anything like you say, back their names go in.

MR. FISCHETTI: I don't understand that.

MR. LEONE: He is saying the names are going to back in the indictment which doesn't matter.

MR. FISCHETTI: In as co-conspirators?

THE COURT: No, they are in just as John McNamara, is in, because he is a defendant.

They would be in, because they were defendants. If the jury is going to be told nothing -- there has been an earlier trial, at that point, a verdict was given with respect to those two people.

MR. FISCHETTI: Your Honor would say they were included in the earlier indictment which is now this indictment, and they were acquitted, I have no objection.

MR. RITCHIE: If I may, I am not particularly concerned with the indictment. I am totally willing to follow your Honor's wishes on that.

THE COURT: I think it would be nice if we had some logical procedure that we will follow.

MR. RITCHIE: I would like to say, with respect.

THE COURT: Should we excuse the jury until two o'clock?

MR. RITCHIE: I thinkthat is a good idea, your Honor.

THE COURT: Is it all right, if Mr. Walsh tells the jury, or should I go in and tell the jury not to--

MR. LEONE: Mr. Walsh can tell the jury.

MR. RITCHIE: Does anybody have any opposition?

MR. GILLEN: No objection.

THE COURT: No what?

MR. LEONE: No opposition.

MR. RITCHIE: There is no opposition, your Honor.

THE COURT: I better tell them anyway.

(At this time, the Judge stepped out of the courtroom to advise the jury to adjourn until two o'clock.)

THE COURT: This is the indictment (indicating). The way it stands now, we left the names of those who were not on trial, out of the caption, on the theory they are simply not on trial.

We did want to modify some of the names, so that we can play down the confusion over the two Alfonses. And as the rest, I think we left in the name of John McNamara, bUt I believe we eliminated

as we did in the earlier trial, the name of Rocco and Angelo.

MR. FISCHETTI: There was a motion by me at a pre-trial conference.

THE COURT: It was a matter of agreement. That seemed like the sensible thing to do at that time.

Now, at least the purpose of reading the indictment to the jury, when we started with the case, it was a good start, because if by some impossible accident, their names had never come up, I think we would have left it that way.

But it was inevitable that their names would come up, because I don't see how Mr. Goberman could have testified or Alan Goberman could have testified in the one case, withoutstating the presence -- their presence, and the other without using a number that permitted the solution of Angelo and Rocco, as those in the room, on one or the other or bOth of the critical occasions.

So, if they were there, were named and weren't named as total non-participants, indeed, a role was ascribed to --

MR. LEONE: Rocco.

MR. RITCHIE: If I may, perhaps the fiction that your Honor would like to indulge in is an

admissible fiction in this case.

THE COURT: I don't say I would like to. I said that is one expedient. You see, the difficulty is that it is opinion, and the defense wants the opinion presented, because it is opinion which can't hurt them.

The Government --

MR. FISCHETTI: We are not that sure.

MR. LEONE: I am not that sure, because the next question is, the next danger is, the jury saying whydidn't they call them? I am confident of that danger, even if you tell them they were acquitted.

THE COURT: It is even more of a probLem.

MR. LEONE: That is right.

MR. FISCHETTI: Knowing all of the changes, we have met and discussed it --

THE COURT: If the jury wants to know why he wasn't called as a witness --

MR. RITCHIE: I believe that would give me leave to argue abOut their acquittal, about the fact they haven't been called to testify by their own brother, and why not.

THE COURT: There are two answers.

They don't have the burden of proof, you do.

MR. LEONE: I wasn't suggesting anybOdy should

argue it, I was saying should it occur to the jury in the jury room, it would present a problem.

MR. FISCHETTI: I was about to say, after discussion, we decided we would rather have a verdict rendered on the fact, rather than on speculation.

MR. RITCHIE: There is an additional problem, if the jury is informed about the verdict concerning Angelo and Rocco Merolla on the grounds it is somehow relevant to this case and it wouldn't be proper to inform them what the prior jury's verdict was with respect to those defendants.

I can see the Court's reasoning for not wanting to --

MR. FISCHETTI: Wait. What was the jury verdict?

MR. RITHIE: With respect to the defendants, either a hung jury or guilty, and it became a hung jury.

MR. FISCHETTI: It was a hung jury.

MR. RITCHIE: There was a verdict of guilty --

MR. FISCHETTI: One person said -- one person said she wasn't sure --

MR. LEONE: Two people. Do you want to say ten convicted and two said they weren't sure?

MR. RITCHIE: These are all opinions. I can see a Court's reluctance to indulge in those opinions,

especially in regard to the evidence favorable to the Government.

THE COURT: Evidence favorable to the Government--

MR. RITCHIE: I do believe, if we are going to go into the opinions, the evidence favorable to the Government -- the opinion of that particular jury is just as relevant.

I would agree it shouldnt' be put beforethe jury.

On the other hand, the acquittal of Angelo and Rocco, I submit, shouldn't properly go before the jury. Perhaps the Court saying that the trials of John McNamara, Angelo Merolla and Rocco Merolla -- they were not tried in this case, and what is being done with respect to this case, is not of any concern to you and should not enter into your opinion.

I think that would probably be the best solution. Your Honor might phrase it a little more artfully, without saying that they were -- but just that their cases are being disposed of another way.

MR. FISCHETTI: Yes, disposed of in another way. They are on appeal, that's how they disappeared.

MR. RITCHIE: Or they are --

MR. MEISELMAN: This is sheer speculation.

MR. RITCHIE: Of course it is. I believe the

jury should be instructed not to speculate.

MR. FISCHETTI: May I ask you this, I haven't rested, am I allowed to put on agent McMullen and ask him what happened to Angelo and Rocco?

THE COURT: How do you mean?

(Continued on next page.)

1 MR. FISCHETTI: I can ask questions --

THE COURT: Only if the answer is irrelevant.

MR. FISCHETTI: He was present in the courtroom when the thing happened. I can ask is Rocco Merolla presently charged with a crime, but I want to do it through the Court so it comes out clear.

THE COURT: There you again present opinion testimony. This time you want to present the testimony of the United States that in their opinion either it wasn't worthwhile indicting Angelo or Rocco or some jury acquitted them or anything. In any event, it is a matter of opinion and an opinion which you would not be urging upon me if you did not think it would help. Because it is self-evident if the thing had been reversed you would not be pressing for its disclosure to the jury.

MR. FISCHETTI: That is true, I admit that. But the point is the way the Government's case now stands, Angelo and Rocco were participants in the matter. As participants, especially with Alphonse Merolla, a brother, the jury must now speculate as to their fate. They have to speculate why they weren't indicted, were they indicted, were they convicted and on appeal? I don't think they should be allowed to speculate. I am not saying it is helpful on both

extremes but we do have the problem where they were not called. At least based on the facts not --

MR. RITCHIE: I would be willing to indulge in the fiction that those witnesses are not available to either side.

MR. FISCHETTI: They saw them in the courtroom.

MR. RITCHIE: They are not available to either side because --

THE COURT: For legal reasons.

MR. RITCHIE: I would be willing to engage in that fiction.

THE COURT: As I pointed out, I am not at all satisfied that it is fiction. They are readily -- they can still be indicted by a State Government, and in addition to that could be charged with the substantive offense.

MR. RITCHIE: I used the word fiction only because your Honor used it. I will go along with that 100 percent.

MR. FISCHETTI: That is not my position. I think the fact of the acquittal should come before the jury and from the Court rather than from testimony.

THE COURT: Nobody has located anything on it.

MR. FISCHETTI: I couldn't find anything. I looked last week and I must admit rather hurriedly.

3 The only case I have been involved in is where the witness testified as to the guilt of another party and they were acquitted and the Government used the same witness to try to prove another crime very similar in character. That was not allowed to go to the jury. This is a far different situation.

MR. RITCHIE: I was down in the library and started to look at Section 12 in McCormick's, the relativity of the opinion rule -- opinions on the ultimate issue. A quick survey of that doesn't reveal any case directly on point but it does give us an analytical model. That is the analysis, is the question of what is a jury verdict, a jury verdict is nothing more than an opinion upon the presentation of the evidence for the jury. It is an opinion based on hearsay --

MR. LEONE: What was that?

MR. RITCHIE: In olden days, one reason that type of opinion was not let before the jury is what is considered to usurp the function of the jury. In this case we have a jury picked by both sides, a jury satisfactory to both sides who heard the evidence, not just the evidence presented last time. Most of the evidence is the same, it is presented in a different fashion. There have been a number of other defense

witnesses. I believe I might have presented one or two different witnesses primarily on the interstate commerce issue. We are not dealing with the same trial, we are dealing with an event occurring nine months after the last trial. I don't believe that this jury -- I do believe that this jury would be severely swayed by the opinion of the prior jury. I don't believe that it should be. In fact, this jury should be the ultimate decider of the facts.

MR. FISCHETTI: I completely agree. I don't want opinion to come before the jury. I want the Court to inform them of the fact that Angelo and Rocco Merolla were acquitted. If your Honor wants to give a further instruction then it has nothing to do with the case, I agree.

MR. RITCHIE: Then I want the entire fact to come out.

MR. FISCHETTI: Fine.

MR. RITCHIE: With respect to the others, that there was a judgment of conviction --

MR. FISCHETTI: Show it to me.

MR. RITCHIE: It was pronounced by the Foreman of the jury and that verdict was overturned -- that is as much of an opinion as the acquittal.

THE COURT: No, because in effect there never

was a verdict or we would not have ended up where we did. There seemed to be a verdict but when the jury was told it appeared that there was no verdict. Because it did not in fact include the assent of at least one juror and thereafter it became reasonably apparent that apparently they did not include the concurrence of two jurors, as I recall.

MR. RITCHIE: That is with respect to one defendant, Alphonse M. Merolla.

THE COURT: No, I think it was that that juror was too chicken to speak up at first but when he was impressed by the courage of the woman speaking up he gathered his courage to echo her verdict.

MR. RITCHIE: I would just note that they were both women.

THE COURT: I'm sorry?

MR. RITCHIE: Both individuals were women.

THE COURT: Whatever they were. They were two juros.

MR. FISCHETTI: And there was no verdict as to John DeLiso as the Court may recall.

THE COURT: Why was there an acquittal?

MR. FISCHETTI: There was an agreement.

THE COURT: The other two --

MR. FISCHETTI: As to John DeLiso, they said

6 they were disagreed.

THE COURT: As to the other defendants who were acquitted, they were acquitted on the identification testimony. We are speculating when we say that --

MR. LEONE: Yes.

THE COURT: You see, if you tell the jury those two men were acquitted without giving the opportunity to the jury to inquire on what grounds they were acquitted, it has a suggestion they were acquitted on the weakness of the Government's case as a whole, or something like that, rather than the fact that the jury probably in the end came to the conclusion that the long and short of it was you couldn't tell the Merollas apart.

MR. LEONE: The jury acquitted because they did not believe Harold Goberman and there was no one else to substantiate Harold Goberman's testimony as to Angelo and Rocco. That, if we are going to speculate, is why the jury acquitted.

THE COURT: We simply don't know. And none of us seems to be able to find a case in point. Or even exactly where to look for it. I looked under relevancy, it is not there. I looked at criminal law to see if it would come up there and I am sure they have it under something else. There are major digest

7 topics yet unexhausted. I would think if we are going to say anything about it, we would have to say something like neither John McNamara nor Angelo Merolla nor Rocco Merolla is on trial in this case and that the fact that they are not on trial and the reason that they are not on trial do not afford any ground for drawing any inferences with respect to the innocence or guilt of those who are on trial.

MR. LEONE: If you should decide to do that, would you also include the instruction that you had suggested earlier, that for legal reasons neither side was in a position or permitted to call them to the stand.

THE COURT: For reasons of law. The testimony of these witnesses apparently is not available to either side.

MR. FISCHETTI: I am sorry. Maywe we are at cross-purposes but for the record and for nothing else, on behalf of John DeLiso, I do not wish that ruling. I wish your Honor to tell them that Angelo and Rocco were acquitted or I ask for a ruling that I am not allowed to bring that out on my case in chief and with that I would rest. I do not wish any other ruling indicating why or how they could not be called to the stand. I wish the fact of the acquittal of Rocco and

8 Angelo because of the reasons expressed to the Court be brought to the attention of the jury.

MR. RITCHIE: I would oppose it.

THE COURT: In other words, what --

MR. FISCHETTI: I ask your Honor to tell the jury --

THE COURT: I will not without being presented with authority tell this jury that they were acquitted. Because it is to present to the jury an irrelevant opinion.

MR. FISCHETTI: I ask your Honor if I be allowed to elicit that fact --

THE COURT: For exactly the same reason, I would sustain Mr. Ritchie's objection to any effort to prove the fact that in the opinion of another jury, at a trial here in January, the Government had failed to prove beyond a reasonable doubt that Rocco and Angelo Merolla guiltily participated in the conspiracy alleged in the indictment.

MR. FISCHETTI: With that, I respectfully except, and the defendant John DeLiso rests.

MS. SELTZER: The defendant Alphonse M. Merolla rests with the same exception.

MR. LEONE: May we be allowed to, before your Honor decides exactly what words to use, after the

9 recess, to suggest language to your Honor?

THE COURT: Yes.

MR. FISCHETTI: I would like an opportunity to discuss it because at the present time it might not be a unanimous opinion. I would ask your Honor during the presentation to give a --

THE COURT: What I was thinking of was something like this, tell the jury that the testimony of Timothy Shea, Sandra Di Nunzio, George Koch, and others with relation to the existence and search for the exact cancellation is evidence relevant only as against the defendant Thomas McNamara.

MR. MEISELMAN: Doesn't that put us in a position where that accentuates the Government's position with respect to Thomas McNamara indirectly?

THE COURT: Inevitably. That is the reason why the other defendants ask for it. It is his baby. Is that right?

MR. MEISELMAN: I am not saying it is.

MR. LEONE: I can put it differently. As a matter of law those are not binding --

THE COURT: Binding isn't useful language. There is nothing binding us except for things like the sunrises, sunsets, seasons, life, death.

MR. LEONE: Marriage.

10 THE COURT: In certain circumstances, taxes.

MR. RITCHIE: The Government wouldn't oppose that language or similar language to it.

MR. FISCHETTI: The final thing --

MR. MEISELMAN: Do we have a premise to that? In the event the jury would consider such evidence being of any import it would not be with respect to the other defendants. But merely to bring it out that way I think accentuates it. If it is important the evidence-

MR. RITCHIE: I don't believe that the Court should be indulging -- I don't think the Court thinks it either -- giving a certain amount of weight and not to a particular testimony. If the testimony is relevant and admissible against a particular defendant, that shouldn't be explained. How important it is, that is for the jury to decide.

MR. GILLEN: Or for Mr. Ritchie's summation. We don't want from the Court -- well, what Mr. Meiselman suggests, if they consider such evidence they should only consider it against Mr. McNamara and he can do what he wants to in summation.

THE COURT: I could say something like this, that the testimony of Timothy Shea, Sandra Di Nunzio, George Koch and others with relation to the existent filing and search for the contract cancellation, if

11 you come to consider and evaluate it in your deliberations, was received and would be relevant only as against the defendant Thomas McNamara.

MR. GILLEN: That is fair enough.

MR. RITCHIE: I have no opposition to that language, your Honor.

MR. LEONE: Your Honor, there was one other matter I had brought to the Court's attention concerning the fact that Alphonse Merolla was not a defendant at this trial in January of 1974 and that he was not seated at the defense counsel table. I think if Mr. Ritchie will stipulate to that --

THE COURT: I thought we had already done that.

MR. LEONE: Outside the presence of the jury.

MR. RITCHIE: I thought it came to the attention of the jury already.

THE COURT: I thought it had.

MR. LEONE: Judge, is there a stipulation? It was done on the Wade hearing but never before the jury.

THE COURT: I knew we agreed some such thing would be said.

THE CLERK: The only way the jury knows about it is through the cross-examination of Allen Goberman.

THE COURT: Oh.

MR. RITCHIE: I will stipulate to it.

12 MR. LEONE: Fine. I don't like to draw attention to it but --

THE COURT: The parties have stipulated and you may take it as the fact that --

MR. LEONE: Fine.

(Continued on next page.)

FOls.

THE COURT: Now suppose I were to say this:

The parties have stipulated the fact that the defendant Alphonse Merolla was not included in the indictment of the first trial and he was not seated at counsel table during the first trial nor present in the Courtroom during that trial.

MR. GILLEN: That is correct.

MR. LEONE: All right.

MR. RITCHIE: I have no opposition to that, your Honor.

THE COURT: All right.

Now on the charge generally, I am going to make some small changes in it and give it to you as soon as possible, but many of them I would like to tell you about immediately.

If you have your copies of the charge handy, at page 5, the third or fourth line from the bottom, it said:

"The first paragraph is directed to alleging matter which shows the nature" etcetera, and I am going to say:

"... is directed to show the nature of the interstate commerce claimed to have been involved in the case."

Now, on page 6, in the last paragraph following

the words, "read paragraph 4," and there are four defendants here -- I think I am right.

MR. LEONE: Yes, sir.

MR. GILLEN: Yes, sir.

THE COURT: Now, on page 6B, and I don't think we have any conspirators not either named as defendants or on trial here, have we?

MR. FISCHETTI: We do not,,sir.

THE COURT: But you see that is where Angelo and Rocco come back to haunt us, and we have to look at it fresh, that is the question of whether the names stay out, come back in, or what. But at the top line -- and anyway, I don't think there were any conspirators to the grand jury -unknown because the one --

MR. RITCHIE: Yes, your Honor.

THE COURT: -- was Mr. Alphonse Merolla and his name is now known.

MR. RITCHIE: It wasn't known at the time of the first indictment.

THE COURT: No, but now that name we have, so the only missing names now are Rocco and Angelo.

In theory this jury could conclude that the Government has proved a conspiracy between any one of these defendants and either Angelo or Rocco beyond a reasonable doubt and that would suffice as long as the

jury were convinced that it were the same conspiracy, that is it could be with everybody else missing from it, but which is highly doubtful, but in theory they could.--

MR. FISCHETTI: May I say, sir, that unless I misunderstand the Court I don't agree with that statement. I thought that we had this prior occasion in which we argued, I thought successfully, that due to the fact that both Angelo and Rocco were both acquitted, the Government could not now charge them as co-conspirators

THE COURT: Cannot charge them, no.

MR. FISCHETTI: Nor any acts on behalf of Rocco or Angelo might partake in be admissible.

THE COURT: I don't know if that is the law because that is what we are deciding to do as a matter of operating procedures.

MR. RITCHIE: Your Honor, I do believe that it would be an improper instruction by the Court if the Court left the jury with the impression that if you believe that any one of these four defendants co-acted, conspired with Angelo Merolla or Rocco Merolla --

THE COURT: Or both.

MR. RITCHIE: Or both, I think that would be an improper instruction.

THE COURT: I don't, but if you don't press for it, that is that.

MR. RITCHIE: Yes, your Honor.

What I would like is an instruction --

THE COURT: They could not be indicted, no question about that --

MR. RITCHIE: That is right.

THE COURT: -- but let me ask you this:

Suppose you have a two-man conspiracy indictment, a two-man conspiracy and the jury found one guilty, disagreeing at the end of the case. No retrial.

Something other than conspiracy? No, because the crime was never carried to completion.

In other words, you can have a failure of proof as to one.

The use of the word "acquittal," produces a very false impression that the principle is he cannot be retried. The principle is not that res adjudicata he is innocent.

How do we prove that?

Well, in United States of America against Mitchell, among other things. Even though Mr. Mitchell was acquitted of evasion of tax, he could be charged with fraud on exactly the same tax in a civil proceeding, even though that would require clear and convincing evidence, because all that has happened here is that the Government has failed to sustain as

against that defendant the enormously heavy burden of proving it beyond a reasonable doubt. That is not a finding of innocence, it is a finding that the Government's proofs have failed, and that is all. They might not fail on retrial, which cannot include that defendant because an absent witness is now available, someone who was sick who had fled out from under a subpoena, but successfully done and after the case was open to the jury -- in other words, for a thousand reasons you can explain an acquittal.

The one thing it is not is an affirmative finding of non-participation or of innocence. It is simply the Government has missed its target and is not allowed a second shot, that is all.

Isn't that right?

MR. GILLEN: I wonder, if your Honor pleases, because the Government can tar anyone for the rest of their life and no one can ever get a clean reputation back.

I agree with the legal principle, I believe that it is --

THE COURT: You amaze me.

Did you read what Mr. Jaworski is reported to have said yesterday about the world's most conspicuous innocent?

MR. GILLEN: I didn't, your Honor.

THE COURT: Well, all right.

MR. GILLEN: It just seems to be a middle ground for philosphy, it just doesn't lay right.

THE COURT: Oh, yes, it does, and the cases -- and I don't say they are legion, although that was in yesterday's gospel in my church, so it is fresh in my mind -- they were legion, they are all devils.

There are a number of cases which emphasize the point that no affirmative inference flows from the fact that a jury has returned a verdict of not guilty, no affirmative inference flows from it, but a monumental legal right rests on it, a constitutional right not to be tried again. But that is the end of the whole story, not to be tried again on the criminal charge, but nothing else flows from it.

MR. FISCHETTI: I have never seen a case, sir, where a person charged for conspiracy and who had been acquitted and who in fact moved to have his name stricken from that indictment, but I think that the question is an interesting one and in my opinion I think it would be granted because I think the Government would have to come up with some proof of this person's participation before other defendants could be bound by his acts.

THE COURT: No, you see, you are thinking of a different thing I think and that is:

What do you do where one person is charged as an aider and abettor and there is no proof that the principal committed the crime.

Now, you can try an aider and abettor alone, and it has been done in bank embezzlement cases -- and we had one most recently in this Courtroom, in the Giordano case when neither of the bank officers was on trial, one had pleaded guilty, the other had been acquitted, but the Giordanos were convicted of aiding and abetting, and in principle you had to prove as against the Giordanos the principal offense and the principal found guilty beyond a reasonable doubt, and that they had aided and abetted it. There was no other way of convicting them because the offense was a bank officer's felony and the only way a depositor could become involved with it was as an aider and abettor.

So here, if the only other conspirator is someone who either is not before the Court or has been acquitted, the proof must nevertheless establish the conspiracy beyond a reasonable doubt, and so here the conspiracy could be one of which the only other possibl conspirator was one who really scored a trial victory over the Government.

MR. FISCHETTI: It just sounds bad to me.

THE COURT: It sounds bad for defendants, yes, but life is rough.

MR. RITCHIE: When I originally said that the Government did think that would be a bad charge, I was thinking in the line of cases where there is a joint trial and there is no other possible conspirator, but I think in a case where there was a prior trial we are dealing with an indicia question but not with a constitutional question.

THE COURT: What?

MR. RITCHIE: I don't believe where there is an acquittal in a prior trial, I don't believe --

THE COURT: All right, all right, now let us turn to page 6-B, top of the page.

"... participated in the formation and carrying out of the conspiracy, as long as it does satisfy you beyond a reasonable doubt that two or more of the defendants" -- and I suggest we say "on trial," or, "any one of the defendants on trial and another person charged as a co-conspirator did form substantially the conspiracy described in the indictment and put it into execution."

As I understand it now, once we get over the Angelo and Rocco point, and if Mr. Ritchie remains of

the same view, well, we can otherwise solve the point, it would seem to me that that is what we have to say, and the only other person in this case, then, would be "John" I think.

MR. FISCHETTI: Yes.

(Continued on next page.)

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THE COURT: I don't like to name him, we could.

MR. RITCHIE: I think your Honor is correct, the verdict of a prior trial would have no affect on the possibility of the conspiracy of Angelo and Rocco Merolla, so I withdraw my original statement that the charge that they could have conspired with Angelo or Rocco was improper, I think it could be proper and that the jury could find that one individual conspired with either Angelo or Rocco or both, and that would be a sufficient basis to convict that individual.

MR. FISCHETTI: I agree, I join in that motion and I ask your Honor now that Angelo and Rocco, and you tell this to the jury, that they were acquitted.

THE COURT: No, no.

MR. FISCHETTI: All right.

THE COURT: You see, I told you why I thought this was a very difficult point.

MR. FISCHETTI: I don't think it is difficult, I think it is a statement of fact.

MR. MEISELMAN: Excuse me, Mr. Fischetti.

Your Honor, may Mr. McNamara be excused.

THE COURT: If it is agreeable to you, Mr. McNamara, that we continue on our discussion in your absence.

THE DEFENDANT THOMAS MC NAMARA: Yes, yes.

MR. FISCHETTI: Your Honor, getting into legal niceties --

MR. MEISELMAN: I'm sorry, your Honor.

THE COURT: What is that.

MR. FISCHETTI: I was going to say, Judge, that it just may be -- well, it is before lunch and forgetting the fact that Mr. Ritchie would like to have an instruction that Angelo and Rocco Merolla could be co-conspirators in this case, and adding to it that both of them could not be charged for this crime, and that keeping this fact from the jury, well, that is not even fair --

THE COURT: As far as I am concerned, I don't believe in keeping things from a jury, any probative matter from a jury, but since we do know that we have run into an opinion thing on this and if there were a verdict of guilty that we would have a concern to the defendants to keep it out, I don't see how it can help on the point. First, to put it in is to suggest a witness in the Government's case and a justification for drawing an inference of weakness in the Government's case that cannot be supported.

I don't see how you can, short of explaining to the jury that another jury doesn't mean a blessed thing, that the verdict of another jury doesn't mean a

blessed thing, all it means is that we don't know whether the Government missed by an ounce or by a ton, that they were not satisfied beyond a reasonable doubt as to the guilt of these men, and that is all, and that the evidence was not the same.

MR. FISCHETTI: Is your Honor going to charge the jury that they are named as co-conspirators?

THE COURT: That is the question for the house.

Now we have one form of indictment there which has not yet been recopied but which leaves out the alibis and puts in the "M," and is otherwise what we had looked at earlier, it includes John's name but does not include the names of Alphonse -- of Angelo and Rocco, which is what we had started out with, and which I agree is the best way to read the indictment in the first instance, that was before we knew how the evidence would shape up, and now we know how the evidence does shape up --

MR. FISCHETTI: Is your Honor saying that the Government has shown in the presentation of their case that Angelo and Rocco by a fair preponderance of the evidence have been shown --

THE COURT: No, what I've said is that we have that wide open and what are we going to do about it.

MR. FISCHETTI: My point is, sir, that I thought

that at the beginning of this trial I asked for the names of all co-conspirators and your Honor said it's by agreement but irrelevant and it can by motion be stricken, that is those names, as being due to the fact that they are not co-conspirators and now Mr. Ritchie is alleging that they are co-conspirators. I believe he would have to prove that at least by a fair preponderance of the evidence during the course of the trial..

Now I just don't think the Court can add names of co-conspirators without the Government proving their participation, as I understand the standard in this Circuit, by a fair preponderance of the evidence, and I don't believe he has done that.

MR. RITCHIE: The Government isn't adding any names, those were the names that the grand jury charged.

THE COURT: I have no recollection ofwhat you said as to that.

MR. FISCHETTI: Your Honor, is the proposal before the Court to add their names in your Honor's charge?

THE COURT: No, I don't see that, I don't think I have said anything about their names, because, you see, that would refer to John. The language at 6-B doesn't refer to any names quar names.

MR. FISCHETTI: Does it say "person" or "persons"? I don't recall.

THE COURT: "And another person charged as a co-conspirator."

It could be anyone of one or three.

MR. LEONE: Can't we stay with the people on trial.

THE COURT: What is that.

MR. LEONE: Can't we stay with the people on trial.

THE COURT: Because the John problem is in the evidence again.

MR. LEONE: It wouldn't be clear that we are talking about John, Angelo and Rocco.

THE COURT: We haven't got Angelo and Rocco's name in the indictment.

MR. LEONE: They are in the testimony.

THE COURT: They are in the testimony, but, you see, the language indicates there is another person charged as a co-conspirator.

You see, they are not at the moment in the draft form of indictment.

MR. FISCHETTI: It would solve the problem to name them or John McNamara who has been severed or -- I don't know --

MR. MEISELMAN: That puts him right in the middle of the limelight, he is not on trial, he has been severed.

MR. LEONE: It doesn't hurt you.

MR. FISCHETTI: He is not here, they can't find him.

MR. MEISELMAN: He may not be here but --

THE COURT: Where do we come out.

MR. RITCHIE: Your Honor, I don't know how defense counsel feel about it, I think there could be a solution that could protect everybody's rights, and that would be for the indictment to be phrased for the purposes of this charge in the following manner:

That the four defendants on trial, their names, combined and conspired, etcetera with one another and with others to the grand jury unknown.

MR. LEONE: Not if the Court means John McNamara, I would suggest they put in John McNamara.

THE COURT: Well, you see he is there now.

MR. FISCHETTI: Is he in the indictment?

Yes, he is in there, in the indictment.

All right, say John McNamara.

What difference does it make.

THE CLERK: It says John.

MR. FISCHETTI: It does not say Angelo or Rocco.

THE COURT: On page 7, the second and third lines from the bottom, "General Motors articles" instead of Buick cars, from outside of the state of New York to Nesconset Highway site.

MR. MEISELMAN: I would be very candid, you have suddenly taken away all of my wind, I was going to raise that point by changing that.

THE COURT: Then oil shipments and building materials from points outside New York to the Nesconset Highway building site and the installing of those materials in the building.

MR. MEISELMAN: Are you saying, Installing it in the building?

THE COURT: Yes, because without that the affectation would be all over and could --

MR. MEISELMAN: That isn't I believe a part of the indictment.

THE COURT: What isn't.

MR. MEISELMAN: The installation at the building, the indictment merely refers to the transportation and movement of them.

THE COURT: Yes.

MR. MEISELMAN: In effect, then, we are broadening the indictment.

THE COURT: Well, I guess that is one argument.

Could I have that indictment that is in your hand.

MR. LEONE: I have the older one.

THE COURT: The older one will do for this purpose.

You see, what the argument is that the interstate movement of the interstate materials was all over before the 5th and the 28th of June and that all that remained was to incorporate them into the building at that date.

(Continued on next page.)

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MR. FISCHETTI: I still believe that the defendants would have engaged in preventing interstate commerce --

THE COURT: Why?

MR. RITCHIE: Because the goods remained to be installed.

THE COURT: You see, his argument is that the purpose of the interstate shipment was to get these materials incorporated in the building and not to just land them in the supplier's warehouse or at the job site, and that in consequence, until they had been incorporated in the building, the relevant interstate shipments had not been significantly consummated, or something to that effect.

MR. GILLEN: It is our argument basically that the goods came to rest, it is like in a classical hijack case which comes after there have been delivered the ocean bills of lading and it is all loaded and it stays on that pier for months and months, and there you get into the question whose agent picked it up and did it come to a rest.

THE COURT: No, the charge that has been repeatedly proved in 659 cases, as I recall them, and perhaps you requested it a few times --

MR. GILLEN: I had.

THE COURT: (Cont'g) -- is that until that movement in interstate commerce -- well, that it does not come to attendance until they have been delivered to the consignee.

MR. GILLEN: Correct, and here they were delivered.

THE COURT: And that is so even though they may have been on the pier for weeks because, you see, sometimes they are on the pier for weeks because they don't clear through Customs and have not yet been removed to a bonded warehouse or anything, so they can stay there for days and days and days until somebody gets up the Customs money.

MR. GILLEN: True, your Honor, but it is still a question of delivery and actual movement in commerce.

I know of no case where it has ever gone so far as to say that the goods are still in commerce because they haven't been worn or the shoes haven't been wworn by anybody.

It is to the consignee, and the consignee in this instance accepted delivery before the acts complained of, according to the evidence --

THE COURT: I don't think we had any material here actually consigned to --

MR. MEISELMAN: That was not delivered.

THE COURT: (Cont'g) -- well, to McNamara Re: New Cars, Inc., because he certainly could take the position that it was never delivered to him until it was installed, and I don't know whether it was included in the requisitions, say the May requisition, and paid for.

You see, some of it was shipped I think after the May requisition, wasn't it?

I am not sure, what was the date of the May requisition?

MR. MEISELMAN: I believe it was -- I don't want to be quoted, I believe it was May 15th.

Your Honor, the indictment itself says --

THE COURT: It says "shipment" and interstate commerce building material.

MR. MEISELMAN: To the site, that is what it charges.

THE COURT: That is right.

MR. RITCHIE: Your Honor, the charge is that he was engaged in the construction of a building for the purpose of which he had moved and caused to be moved in interstate commerce articles --

THE COURT: Yes, yes.

MR. RITCHIE: There is no variance between the pleading and the proof because what the Government

has proved is that he was engaged in the construction, and he was still engaged on June 28th, and for the purpose of the construction he moved or caused to be moved articles.

Now, your Honor, I had previously cited the law to this Court in this case, and the Court has previously accepted that law that as long as the goods are not installed, and this is with respect to --

THE COURT: Not what?

MR. RITCHIE: -- installed, and this is with respect of not yet being installed and incorporated and becoming affixed.

THE COURT: I don't think we have a case that is closely in point.

MR. RITCHIE: I believe we do, your Honor.

THE COURT: I don't.

MR. RITCHIE: Well, I'm sorry, then.

I don't know offhand --

THE COURT: What is it?

MR. RITCHIE: I don't know offhand. We had previously gone through this whole affair and I wasn't prepared to relitigate this whole question now, but I am sorry and I would say that the Government's charge is that he was engaged in construction for the purpose of which he had caused to be moved certain

articles, and the evidence in this case establishes that not all the goods were installed by July -- by June 28th, as a matter of fact, goods were, you know, installed until somewhere in the middle of July, the light posts, the overhead doors were finally installed completely by July 7th.

MR. MEISELMAN: The evidence discloses, your Honor, from Mr. Ritchie's own witness, that one of the reasons it wasn't installed was because he took his men off the job because of the posting, Merkel Electric did it for that very fact, and he called his men off. So there was no work being done after June 20th, but not because of any possible interference but by reason of the posting by the town.

MR. RITCHIE: Harry Goberman was done, he was done and the posting was by the town --

MR. MEISELMAN: Certainly between June 20th and the 28th, the witness Taibbi said that there was no work being done, and he was there and observed it.

MR. LEONE: He was parked across the street and observed no work being done.

THE COURT: No question about it.

MR. GILLEN: What we are talking about is with reference to commerce, and that is a question

of fact for the jury. Mr. Ritchie can argue to the jury that it interfered with interstate commerce in that it wasn't delivered. I think we should be able to all argue that in truth and in fact all goods were delivered, all it is is a question of the Court charging, and the problem came about because of a stretching of the statute. In this particular case -- and we said it once before -- we are not once but twice or three times removed from the statute.

THE COURT: Only none of us had a case in point.

MR. GILLEN: Your Honor, every time a court says that, Do you have a case in point, and it is in a rather strange and unusual situation, the lawyer's answer is, No, and that is for one good reason, and that is that a case like this is never brought to this court; this is a state assault charge, if it be anything.

THE COURT: This is a what?

MR. GILLEN: A state assault charge, where it belongs, in the state court, if it belongs anywhere. It does not belong in a federal court, and that is what we have been arguing since the inception. The problems are caused not by the defense but

by the government's use of this particular statute under this set of facts and when the goods have all been delivered and when we have actual delivery to the site, and we had the main witness swearing that the goods were all delivered to the site, and now the Government is saying, Well, they weren't installed. If the door were installed, then somebody would say: They didn't turn the knob of the door, or, They didn't walk in; they would say either they didn't turn the knob of the door or they didn't walk in.

MR. RITCHIE: The light posts weren't installed either, quite a number of things were not installed.

THE COURT: I know, we can name a number of things but we are confined to the evidence.

MR. GILLEN: The point being that our argument is that installation has nothing to do with it, it is the flow of goods in interstate commerce which the statute aims at.

MR. LEONE: Period.

MR. RITCHIE: It aims at the extortion of an individual engaged in commerce who --

THE COURT: No, no, it doesn't say that at all.

MR. LEONE: I might be engaged in commerce, I might be extorting nothing, that has nothing to do

with it.

THE COURT: No, the offense is:

"Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article in commerce by extortion or conspires to so do shall be fined or imprisoned or both."

MR. RITCHIE: As the statute reads, it need not affect the movement of articles or commodities in commerce.

THE COURT: Look, it says:

"Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article in commerce by extortion or conspires to so do shall be fined or imprisoned or both."

MR. RITCHIE: Yes, your Honor, and it is not limited to affecting the movement of articles and commodities in commerce.

THE COURT: But it says --

MR. RITCHIE: It says if it affects commerce or the movement of articles in commerce, it isn't limited strictly to movement of articles.

THE COURT: No, it does not. Oh, I see what you mean, you say whoever in any way or degree obstructs, delays or affects the movement of any article in commerce?

MR. RITCHIE: Yes, your Honor.

THE COURT: All right.

Now how is the commerce affected because I think in this case --

MR. RITCHIE: The man was as yet engaged in commerce.

THE COURT: What?

MR. RITCHIE: The man had gone --

THE COURT: Oh, no, because they say he had been --

MR. RITCHIE: I would submit because the goods had yet to be installed and because he was building and that building was to be in commerce, he was as yet in commerce and he was in commerce as of that date.

MR. MEISELMAN: There is no proof to that effect.

MR. RITCHIE: The proof that has been submitted is the testimony of Mr. George Little and the testimony on transportation, Mr. Anderson, and the testimony of Mr. Brady from the Overhead Door Company and the testimony of Mr. Goberman with respect --

THE COURT: The most powerful evidence is what Mr. Gillen brought out when he was examining somebody, to the effect that the only purpose the

action was taken with relation to Goberman was to expedite the completion of the building.

MR. GILLEN: It was Mr. O'Sullivan's testimony, your Honor.

If that is Mr. Ritchie's theory, then where does he now claim about the parts and the cars moving in interstate commerce, they had nothing to do with Mr. Goberman.

THE COURT: What is that?

MR. GILLEN: If that is Mr. Ritchie's theory, that Mr. Goberman was in commerce and that is his theory of the prosecution on the statute, where then is his argument or whatever he is going to say concerning the movement of automobile parts and the movement of automobiles, what does that have to do with either McNamara Buick Pontiac, and not even with McNamara Re: New Cars.

MR. RITCHIE: The purpose of the construction of that building, that is what it has to do with, the purpose ofthe construction of that building. It doesn't have anything to do with Mr. Harold Goberman or with anybody as long as it was for the purpose that the building was to be used for.

MR. MEISELMAN: You have to show an obstruction or affectation or delay, there has been no showing,

indeed it has been shown that there had been an increase.

MR. RITCHIE: It was shown to be an affectation, the affectation need not be the movement of automobiles, it can be an affectation of a person engaged in commerce, that is all that need be shown, in any way or degree, as the statute says, and I submit that in some way and degree commerce has been affected.

THE COURT: Well, what commerce?

MR. RITCHIE: The commerce is the commerce that Harry Goberman was engaged in at that time, he was engaged in the construction of the building which is to be used for the receipt of automobiles from interstate commerce and at the time he had caused to be moved certain articles and he was in the process of installing those articles and they did not yet complete installation and that was how he was engaged in commerce, and the effect upon commerce was in his removal from commerce.

MR. GILLEN: Your Honor, the evidence shows it was his own choice, he stopped the installation of any goods that were on the premises.

MR. LEONE: Is it the Government's position that had those articles been installed that there

would be no question that he was not engaged in commerce any longer?

That is what I seem to understand from the argument made by Mr. Ritchie.

MR. RITCHIE: That is a hypothetical argument, I am not ready to discuss that argument, we had certain facts and those are the facts that I wish to discuss.

THE COURT: Very well.

What shall I charge the jury?

MR. GILLEN: Your Honor, from our discussion of the charge, I assume that our motion would be unsuccessful at the end of the Government's case.

THE COURT: I ask you, what shall I charge the jury?

MR. GILLEN: I would respectfully request to charge that if the jury finds that the goods, if they believe the evidence, that the goods were actually delivered to the site and the jury may find there was no interference with interstate commerce, then they may acquit.

MR. LEONE: On that point --

MR. RITCHIE: I ask that the same charge be given as last time.

THE COURT: That frames the issue.

MR. MEISELMAN: May I respectfully request that it might be helpful if the Court were to charge that the words "obstruct, delay and affect"are generally synonymous and mean prevent, hinder, stop or slow down commerce, and if the jury were to determine that the conduct of the defendants, whatever they find it may be, did not obstruct, delay or affect commerce as defined, then they need go no further, they should find a verdict of acquittal for the defendants.

THE COURT: No, I was thinking about that, I thought about that, I mean whether you could say that because all the other words are words of retardation, then affect would also have to be a word of retardation.

MR. MEISELMAN: Yes, sir.

THE COURT: And I just don't think so because I think, for example, if we go back to the fabled labor unionization origin here, that is the goon squad tactics could be employed to destroy a strike and resume shipments, then you could --

MR. MEISELMAN: There I could understand it.

THE COURT: Or if you have the strike use to extort money from somebody interested in expediting some construction and he pays the money in order to

get a speedy resumption of commerce under the coercion of a racketeering union leader, that would probably be well within the Hobbs Act.

MR. MEISELMAN: That would be a threat to obstruct or delay.

THE COURT: And here for example the argument is supposed to be that they wanted to get Goberman off the job at all costs in order to expedite the job, but that in and of itself, that would be an affectation of commerce, if commerce there is, and what Mr. Ritchie suggests is that there are two commerces that you have to think of, commerce involved as being much more than the usual shipping of parts to a building site, it includes the entire movement of these "dedicated" parts. These are not just goods that are fungible with a million others that can go into stock and be sold off the shelves, they are not staples, these are in effect the kind of thing that nobody stocks, you order them for a particular job and these were delivered to a particular job. They come sweeping in from out of the state and you have to visualize the commerce involved is the commerce which ends in an act of construction, erects them on the site as they were planned to be erected from the moment

when they left their place of origin, wherever they originated, and that the completion of the construction work is the commerce affected. If you train your attention on the commerce in which Mr. Goberman was involved because he wasn't an employer of building materials, if he was anything he was a builder, so that he was in commerce only because he got the materials from outside the state with a view to incorporating them permanently in the building within the state, and that was a unitary task.

The things that were ordered and shipped from out of state were dedicated to this building from the moment they either came into being or were outside of the state or were pulled off the shelves outside of the state, whichever they were.

(Continued on next page.)

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(Outside of the presence of the jury.)

THE COURT: The other commerce involved is the delay of the initiation of a commerce in automotive parts perhaps including automotive parts organized into complete vehicles at the Nesconset Highway where all those automotive parts would be coming in the General Motors units outside the state.

Now, that is the commerce he sees as threatened.

MR. MEISELMAN: I cannot see it as such. If it was so, and --

THE COURT: Now, put up to you the question we had before, are we all a lot better off agreeing these facts so that they go to the jury on a charge that you can jump all over on appeal if one or another defendant is convicted and the Court can evade you by saying "We don't know what the jury believes," and/or are we better off by giving it to the jury so that they can obscure the issue on appeal in case they find a verdict against somebody, as we know they are quite possibly capable of? Because really, we don't have any disagreements as to what the facts are.

MR. MEISELMAN: I had suspected when I was reading or proposing to your Honor the charge --

THE COURT: We started this case and indeed ended the last case on the note that we would have

completely to reexamine that portion of the charge in the light of the jury's manifest difficulty with it at the last trial. I will not say this again. At earlier pretrial conferences in connection with this trial I again drew counsel's attention to the matter and suggested that we have to help each other to fresh charge language, quite possibly, and that it might well be advisable to see whether or not the issues should not be taken from the jury where there is no genuine controversy over the controlling fact and the law appears to be that I must tell the jury that if they find the facts to be thus and so, then that is as a matter of law an affectation of commerce. That seems to be the law.

MR. MEISELMAN: Your Honor, there would be one added item. In a case that is already somewhat confused by the evidence concerning interstate commerce we have the additional factor, that is interstate commerce by parties who have not been charged with having obstructed or delayed it. That for instance Len-Al or Goberman --

THE COURT: I heard about Len-Al.

MR. GILLEN: We don't want the issue taken from the jury, it is a jurisdictional prerequisite based on facts in the case and our position has been that from

the beginning.

THE COURT: I hear you. You have no request.

MR. GILLEN: Yes. The request that the jury be told the affectation of the interstate is a jurisdictional prerequisite for this case to come into the Federal Court. If the jury finds there has been no inference with interstate commerce, they must acquit.

THE COURT: If they find what?

MR.GILLEN: From the facts adduced from the standard, the documents in evidence, there has been no inference with interstate commerce, they must acquit. I know no other way to say it, sir.

MR. RITCHIE: I think that is already --

THE COURT: No, emphatically not.

MR. RITCHIE: Well -- I submit this complex jurisdictional question is if the evidence is believed by the jury up to the Judge to decide whether there is an affectation of commerce or not as long as the evidence is believed. I think the jury has to realize if it doesn't believe the evidence of interstate commerce it should acquit.

THE COURT: The difficulty with the language Mr. Gillen suggests, itdoesn't tell the jury what interstate commerce is or what commerce is or what the movements of articles in commerce is.

MR. GILLEN: I should say both sides should sum up and give their explanation to the jury about what the affectation is and movement of goods are. We do not create the situation, we are attorneys faced with it and again the statute, I don't believe was designed for this type of thing but it is being used here and that is where the problem begins. That's why we can't find a case.

THE COURT: You can produce cases that go to the extreme of the law. That's why I mentioned the Smith case, because the cases as they stand go to the point of saying that if you materially subtract from the person engaged in commerce, that is an inference --

MR. MEISELMAN: But in this case it is the testimony of the witnesses themselves, the chief complaining witnesses. They had no resources to start --

MR. GILLEN: And then they got $35,000 --

MR. RITCHIE: The testimony was he had $50. I think that is resources enough according to the very broad language of the Hobbs Act.

MR. MEISELMAN: I think we are straining.

MS. SELTZER: Can I go out to make a phone call?

THE COURT: Well, we will resume at 2 o'clock to the Government's rebuttal witness.

MR. RITCHIE: I had spoken with Mr. Fischetti and

I will not present my rebuttal case.

MR. GILLEN: Is that to all defendants?

MR. RITCHIE: Upon my understanding that Ms. Seltzer and Mr. Leone and Mr. Fischetti are all going to rest --

MR. GILLEN: They already rested.

MR. RITCHIE: Yes, I am not going to present any rebuttal case whatsoever.

MR. FISCHETTI: Can we talk about order of summation?

MR. LEONE: LEt's do it at 2 o'clock. 2 o'clock, your Honor.

At 2 o'clock will you also hear our motions?

THE COURT: Heavens yes.

(A recess was taken at this time until 2 p.m. this afternoon.)

PM next

AFTERNOON SESSION 1899

EK:GA
T1R1 PM

October 21, 1974

2:15 o'clock P.M.

(The following occurred in the absence of the jury.)

THE COURT: Are we about where we were?

MR. LEONE: Yes, sir.

THE COURT: Well, we have been working on the Charge, and while it is downstairs being multiplied, I think I can tell you the general idea.

If you turn to page 7 and 8, which have the essential elements -- Do all of you have a copy of it, because we mailed two copies of it.

MR. GILLEN: I have a copy, it is too difficult to locate it.

MR. LEONE: The papers are piled up.

THE COURT: Oh, well, it is not important, it is just the Charge.

What I thought was to leave the first and the second, and then go to the third, and let me read it to you. Now, don't try to follow it from that page. I will tell you that all it does is to defer the evil day to later in the Charge by saying this, which does two things, and it brings in what Mr. Ritchie emphasized, that is, that it is to affect commerce or movement, so

it would say:

"Third" -- And, also, I think the form here assumes success and not Conspiracy, and maybe that is a small note which you might want to think about, and suggest anything, perhaps leaving out some words, but to continue:

"Third: That the affect of the use of the acts of the Conspirators directed against Goberman would in some degree or manner delay, obstruct or affect in some way interstate commerce, or the movement of any articles in interstate commerce.

Now, that just begs the whole quesiion.

Then, let us go to the fourth, and the rest of it, and then we come to the pages, I think it is 12 and 13, and we materially change them, there first we talk about the automobiles and the other things, as a and b, as indicated there, but specifically to tell them that if they find that the material was shipped specifically for this job, and had been delivered before, but had not been completely erected before June 28th, then they might find, they may find that there has been an interference with commerce, and then explain, as in the next following sentence; in other words, that would flatly treat delayed installation as a part of the sweep of commerce, provided the contract was one to erect the building, and the inter-

ference wis with the performance of that contract, and the parts were ordered outside the State, the materials were ordered outside the State, specifically for that building site, and despite the fact that the installation -- well, the shipment was completed, but the installation wasn't completed on the critical days.

Now, that would squarely put it up to the jury, and I think Mr. Ritchie, I think, would be content to put on the building aspect part of it. In other words, it would change that language that you have before you --

Mr. Ritchie, may I borrow your copy, because mine is downstairs at the moment?

MR. RITCHIE: This is the Charge recorded by the stenographer.

THE COURT: You have a Xerox copy in addition to that?

MR. RITCHIE: Yes, your Honor.

THE COURT: I don't know what I did with it.

MR. RITCHIE: I am just stating that this doesn't correspond with that by page.

THE COURT: It is a reasonable facsimile.

MR. RITCHIE: Yes, your Honor.

THE COURT: What I am saying is, If you find that the building materials -- some language like, well, specifically ordered for the performance of the contract from outside the State were shipped to the job site, or

for erection in the building, and had been shipped before June 28th, but not yet erected, then you find that the Government has established the three essential elements, in other words, that the fact that it had not been erected would be enough, provided it had come from out-of-State, and was dedicated to this contract.

MR. GILLEN: Your Honor, frankly, we would except for that portion of the Charge.

THE COURT: Except, E-x-c-e-p-t?

I don't see how you could do otherwise.

MR. MEISELMAN: With respect to that Charge, if your Honor please, if your Honor were to Charge with respect --

THE COURT: You see, let me make myself perfectly clear on that:

I think if I Charge it any other way, I will be permitting the jury, or would be creating a situation in the jury, where without a detailed examination of the record, it might be supposed to have found that it hadn't had all been shipped, but there isn't any evidence that there was unshipped material that was coming from out of State.

MR. MEISELMAN: In fact, it was all there, the evidence is that it had all been there.

THE COURT: No, the evidence is that with the

exception of that -- I don't know, some little thing, what was it?

MR. MEISELMAN: It was a spring on a door.

THE COURT: A spring?

MR. MEISELMAN: I wasn't referring to that, I was referring to the mechanics' lien.

THE COURT: Apart from that, the evidence shows that they were specifically to have been ordered out of State for the Nesconset Highway job, and that it had all arrived in the State --

MR. GILLEN: That is correct.

THE COURT: Nothing was said about things which were not specifically covered by evidence of out-of-State shipment, because I am sure -- Well, I mean, if you want to do it, you could show that the cement had come from someplace else, and some of that had still to be replaced, and that perhaps some more bags of cement were to be delivered, et cetera, et cetera, et cetera.

I think advisedly Mr. Ritchie has not gone into that because that is material which really is susceptible of local storage, and might have been in local storage for months.

MR. RITCHIE: I was about to go into that, your Honor, I learned that to my dismay.

MR. MEISELMAN: I would want, your Honor, if your

6 1 Honor is going to Charge --

2 THE COURT: Why don't we wait until we see that
3 language?
4 What I want you to be clear about is the theory
5 of the Charge, and if need be, even after Summation, we
6 can look at the language again, and tamper with it some
7 more, but the theory of the Charge is definitely that
8 to interfere with the performance of this contract was
9 an affectation of commerce, because even though most
10 specifically-ordered materials may have been shipped
11 after the impact movements charged in the indictment,
12 there was much still to be done in erecting those mater-
13 ials coming from out of State.
14 That, as I understand it, Mr. Ritchie is content
15 to leave, and I think he has to be, because I think the
16 other evidence coerces him to.
17 MR. RITCHIE: I believe it does, but may I say --
18 THE COURT: Now, that does not mean that I have
19 left the automobile parts out of it, but there we are
20 embarrassed by the unfortunate -- Well, it looks like a
21 dropped half-line in paragraph one, which unfortunately
22 does say -- Well, it does speak of the same of new auto-
23 mobiles, ". . . parts of which were to be manufactured,"
24 and instead of which it were to say, "which were to be
25 manufactured in other states."

MR. RITCHIE: That was done to prevent t preparation of --

THE COURT: If they hung a radio on it, then somebody might say, That is not the completed automobile?

MR. RITCHIE: Yes.

THE COURT: I thought all of that stuff was hung on the car over in Edgewater, or wherever they do it, all the junk that you have to pay extra for.

MR. GILLEN: I think it is computerized, and all done in the factory.

MR. RITCHIE: I purchased an automobile in '72, and spent $238 for what they called factory-installed, but actually it was installed in the service facility, it was an FM-Stereo radio, and it was in contemplation that --

THE COURT: Oh, how does it work?

MR. RITCHIE: It works fine, beautifully, and it was in contemplation of that that I sought to hedge my bets.

R2 fls

(continued on next page.)

EK:GA
T1R2 PM

MR. MEISELMAN: I would ask that if your Honor Charges in that fashion, then as Mr. Gillen said, of course, we except to it, but that you would also Charge that they may consider the effect that the stop-order of the town had.

THE COURT: No, I refuse to.

MR. RITCHIE: Your Honor, if I might ask, there will be no more evidence today, but I don't know what your Honor intends us to do, that is, to start Summations today, or complete Summations, or what, but if we are not going to start Summations today, I would ask, and I think defense counsel will join with me, that we send the jury home just for their sake and their convenience.

THE COURT: Of course, of course, we will start Summations.

MR. RITCHIE: I don't know what your Honor's plans are.

THE COURT: Start Summations.

MR. RITCHIE: Yes, your Honor.

THE COURT: I think we have agreed.

MR. LEONE: We are going to start today?

THE COURT: Yes, of course.

MR. FISCHETTI: We have agreed on the order, the only thing we would ask, and I don't think this is going to be a problem, we would request from the Court

that, well, I think we can fairly say that in the Summations Mr. Meiselman will lead off, I believe Ms. Seltzer is second, and Mr. Leone, I am last, and, of course, Mr. Ritchie.

We would request that Mr. Ritchie not be allowed to Sum up himself on the following day.

THE COURT: No, I can't promise that, because it might well run over.

MR. RITCHIE: Would it be possible, your Honor, if we were getting close to 4:30 --

MR. FISCHETTI: I am talking about tomorrow.

Maybe I didn't make myself clear.

We think if we got to the last Summation today, which would be Mr. Leone, and which surely and certainly will be around 4:00 o'clock, that we could mark time --

THE COURT: 4:00 o'clock what?

MR. FISCHETTI: That we could then mark time.

THE COURT: You mean today, today?

MR. FISCHETTI: If I be allowed to sum up tomorrow with Mr. Ritchie, rather than starting today, and then have Mr. Ritchie all by himself on the following day, --

MR. RITCHIE: I can see the point.

I wish I could put a little say-so in today, but I guess it is not possible.

THE COURT: Now, the other thing is that I did

turn up only one case, but we haven't really had time to do much on it.

What was the citation (addressing Law Clerk)?

MP fls

(continued on next page.)

THE COURT: The fact that a man has been acquitted of the conspiracy charged at a separate trial can't be used in evidence and that part of the Court's language was unfortunately all compacted in one brief paragraph that simply adjudicated the issue -- hold your hats, gentlemen -- between the successful defendant and the Government and not between the Government and the defendant on trial as to whom that issue was still unadjudicated.

Now, the Court used that simply as a ground for rejecting evidence of the acquittal. Not, and our hurried reading of the case isn't enough to make us too clear -- it does not appear that the case went to the jury on the ground that the conspiracy was between the defendant, certain other defendants, and the acquitted man. It didn't seem to us that you could say that was the situation before the Court. The brief paragraph is, and this is from the Fifth Circuit point 10 page 76 of Burt against the United States and Gilleland against the United States, 139 F. 2d, 73, on page 73, it's a 1944 case, so you can see it is out of the press.

THE LAW CLERK: Cert was denied.

THE COURT: Except as to the Fifth Circuit. At a time I think it was a strong circuit. "The Court

rejects evidence that a man named Law had been acquitted of the conspiracy. There was no error. Law's innocence was of course adjudicated as between the United States and Law but not as between the United States and Gilleland who was not a party to Law's trial."

The only difference I see is that apparently Gilleland was not a party to the other case.

MR. FISCHETTI: The first trial.

THE COURT: But, I can't think that makes a difference on the participation count or the participation part of the conspiracy count. That's as far as we went.

MR. GILLEN: I only have one request, towards page 211-A.

THE COURT: I will change page 100 around so it recites the witnesses present at this case.

MR. GILLEN: 211-A talks about the credibility of witnesses. I would respectfully request to charge in this case that if the jury finds from the testimony of Harry Goberman and from the evidence adduced in the case that Harry Goberman is an inherently corrupt, evil individual that this in and of itself is enough for them to disbelieve his testimony. Such testimony from an inherently evil person is highly suspect and must be looked at with the utmost caution and weight be

3 extremely scrutinized for falsehoods.

THE COURT: I think that is exorbitant rhetoric --

MR. GILLEN: I'll drop the word corrupt.

THE COURT: All God's children have wings somewhere.

MR. GILLEN: In the alternative, a charge if the jury believes the testimony of Harry Goberman and the evidence that the inherent criminality of Mr. Goberman's character, that is enough to disbelieve his testimony. I say that because of his long history of conflicts with the law and use of names, and on the grounds --

MR. MEISELMAN: And on his regard of the oath.

MR. GILLEN: That's right. He has a different oath for every thing. This is part of the proof. The truth to him is meaningless.

THE COURT: I think that is all fair summation. I don't think it's fair for the Court to charge it. I don't see how anyone can interfere with argument in moderate tones of voice --

MR. GILLEN: I am not going to sum up, your Honor.

MR. LEONE: You won't be hearing from Mr. Gillen.

MR. MEISELMAN: Mr. Gillen may wake up where I might put to sleep.

MR. GILLEN: He said moderate tone of voice and

4 I didn't know who he was talking about.

MR. FISCHETTI: I have two requests. I also did want to argue our motions briefly which we didn't get to.

THE COURT: Yes.

MR. FISCHETTI: With respect to the charge, I would now on this trial ask your Honor for a mere presence charge. If your Honor would charge that mere presence at the scene of an alleged crime even coupled with guilty knowledge is not sufficient to convict that individual. I can prepare something for the Court. I'd rather do it that way, and submit it tomorrow morning. We will be summing up tomorrow.

THE COURT: Mere presence --

MS. SELTZER: In other words, knowing spectator charge.

MR. RITCHIE: I think that is appropriate in a substantive case but not a conspiracy case.

THE COURT: Even in a conspiracy case you have to do a little more than stand around.

MR. FISCHETTI: I believe the Second Circuit said in words in and substance you must have a stake in the venture --

THE COURT: That is a different thing. That is the Learned Hand language.

5 On 66-A, let me look at the language I have in there, Mr. Leone, and I think somewhere along that line is appropriate for -- you see, it is a little bit unreal because the case turns on Goberman's testimony. And his testimony of having been roughed up twice. And what is keeping people in the case is really that he laid his tongue at every one of them at sometime or other, so that I am not too sure that anyone is entitled to that except possibly John DeLiso, who might have stepped out of the room on one meeting but not on the other.

MR. FISCHETTI: He testified, if your Honor may recall, that on June 28th he went back and forth on it, but the basic part of the testimony was John DeLiso did not beat him on the 28th.

In fact, we have in Agent McMullen's report, we have a 302, where he said that. He said John DeLiso was one of the men in the room and did beat him on June 5th. However, we do have the testimony of Allen Goberman which puts him outside the room. I am not saying it happened that way, I am saying based on the testimony I am entitled to a mere presence charge.

MR. RITCHIE: He testified John DeLiso beat him in the course of the first but not second meeting.

6 There were two meetings on June 28th. The second of which as I recall the testimony John DeLiso did not participate in according to Mr. Goberman's final version of the testimony.

MR. LEONE: May I add this point, that the jury -- I think we are entitled to such an instruction because the jury may find that in fact one or more of the defendants was or were present at the scene. They might disregard or choose not to accept --

THE COURT: You don't know how they will sort the testimony out, is that it?

MR. LEONE: They may leave out certain testimony and they may come up with the man merely present and --

THE COURT: O.K., I've got it.

MR. MEISELMAN: Also the question of the testimony by Allen and Harry to the effect they had business relationships with the Merollas.

THE COURT: No, A.M. Merolla.

MR. MEISELMAN: That in respect -- that would make their presence there equally equated to the other business as well as to a conspiracy.

MR. RITCHIE: That is not the testimony in the case. I realize defense counsel stayed as far away from that question as they possibly could --

THE COURT: It is kindness that makes you say

7 that. 1914

MR. MEISELMAN: I thought we hit it all.

MR. RITCHIE: I do believe that the evidence clearly establishes the purpose of the Merollas in being there, if believed by the jury.

MS. SELTZER: As far as --

MR. RITCHIE: I think it is really a question of fact and a question of summation.

MR. LEONE: The danger is, with the Merollas being there --

THE COURT: As I say, I will consider such language in the light of what you have said and see if I could come up with satisfactory language. I've used such language in the past.

MR. FISCHETTI: I would also request your Honor charge in words or substance Harold Goberman's civil lawsuit againstall the defendants in this case may be considered by the jury.

THE COURT: You can argue that but I wouldn't charge it.

MR. FISCHETTI: All right, sir.

MR. MEISELMAN: So that the record may be clear, I would respectfully except to that portion of the charge as appears on the new charge your Honor just handed us on page 12 concerning the shipment of Buick

8 cars and concerning the erection of materials which had been shipped to the jobsite.

THE COURT: I haven't had a chance to read that over yet and I don't quite know what it says.

You mean because it says Buick cars?

MR. MEISELMAN: Yes. I don't think the shipment of cars was encompassed within --

THE COURT: Distinguishing betweens cars and automotive parts? Or are you saying you don't think the use to which the facility is going to be put is material?

MR. MEISELMAN: Both. I think that the use to which it was going to be put was speculative. The fact that Buick cars were shipped was outside the scope of the indictment. The indictment relates --

THE COURT: I will change Buick cars after A to automotive parts.

Next?

MR. MEISELMAN: With respect to that part which you state if the material had not been erected by June 28th, as a matter of law the jury may find the establishment of the owner.

THE COURT: Yes. That's what you must except to if you want to preserve the point. Right. And the rest of that language directed through, including the

9 next sentence -- 1916

MR. MEISELMAN: Yes. I submit the word affect -- well, we have argued it.

THE COURT: I think one might fairly say we argued, yes.

MR. LEONE: Your Honor, I would ask your Honor at least charge the jury generally as to motive of a witness to testify. The general charge --

THE COURT: I do. You know I do.

MR. FISCHETTI: We can't find it.

MR. LEONE: We can't find it. I thought you did the last time.

THE COURT: Did it fall out of the charge? It's usually on page 206, yes.

MR. FISCHETTI: I would ask your Honor in there to specifically mention Harold Goberman and the fact he is an interested witness because of the civil suit.

THE COURT: I believe you can dilate on that until the cows come home. It's not lost on the jury.

MR. FISCHETTI: All right.

THE COURT: Magistrate Courts throw summonses out regularly if they feel the conviction is likely to turn up in a civil suit a little later.

MR. MEISELMAN: We are going to open to the jury, may I be excused for a moment?

1916a

10 MR. RITCHIE: May I also?

MR. FISCHETTI: Can we make our motions on the record?

THE COURT: Yes. Do you want to move in order? Mr. DeLiso first.

(Continued on next page.)

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MR. FISCHETTI: On behalf of John De Liso, as I understand your Honor reserved the motion under Rule 29 at the close of the Government's case, Mr. De Liso now moves at the conclusion of the entire case and renews all motions and asks for a judgement of acquittal.

I would like to be heard briefly with reference to the jurisdiction aspect of this case. Not with respect to the interstate commerce which has been argued but with respect to whether or not the Federal Government has over reached itself in bringing this indictment under the Hobbs Act.

I have no cases to support my argument other than United States against Archer in which there was some language indicating that perhaps there should be a line inthat now practically every prosecution could be considered Federal.

The District Court may have the inherent power to determine the Grand Jury has indeed indicted someone for a technical violation which would become a technical violation of the Federal law which should have been brought in a State court.

There the interstate nature, I believe, was a telephone call. It was a travel act violation.

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Here I feel from the argument both by Mr. Meiselman and MR. Gillen with the interstate commerce of this indictment, construction of the building, that the Federal jursidiction if there is one technically has been overreached in the bringing of this indictment and therefore the indictment should be dismissed.

THE COURT: Well, I suggest that I reserve decision on Mr. De Liso's motion and I will do so on the others.

I am resolved to give the case to the jury but I think we have perhaps in this case a responsibility after the jury comes, if they come in against one or more of the defendants, to look around the case again, before we let it slip away from our hands, to see whether we come to the -- beyond a reasonable doubt standard for submission in the newer sense.

It is a difficult case. It is difficult case partly becasue, because of the obvious attack that can be made on Mr. Goberman's credibility, compounded perhaps by an uncomfortable feeling about whether the strong view of commerce is wholly appropriate.

And mostly on the question of whether this is

3

not the sort of case in which we are faced -- I remember the time I first came to the bench here, Judge Bartels spent at least two months worrying about a big interstate complicated dire act case in which you had wholesale shipments of motor vehicles and he had one defendant on which he felt that technically it was all but impossible to keep it from the jury and he reluctantly let it go to the jury and to his surprise the jury came in against that man.

There was a motion for a new trial as to him. And also a motion for a direction, renewal of a motion for direction.

I know that Judge Bartels, who is perhaps more conscientious than most mortal men, had a terrible time with it because if he granted a new trial he felt he had to dismiss it.

It wasn't a question of a new trial, because if it was against the weight of the evidence it is only because it should never have gone to the jury at all.

I have the possibility here that we might in this difficult case get a pattern of verdicts because you are going to get a verdict, you might

4 just on the one count and you might get a pattern of verdicts which will be illuminating to all of us, in a close case like this.

I will reserve decision.

Now, if I had no power to do that I would deny the motion. But I have the power to reserve, then do.

And the same would go for Mr. Alphonse Merolla.

MR. GILLEN: On behalf of Thomas McNamara, I most respectfully join in the motion made by Mr. Fischetti with the added adendum that Section 1951 is unconstitutional in that --

THE COURT: If extended?

MR. GILLEN: Yes.

If the Government's theory is correct because that is the very powers reserved to the State and only those -- the Federal Government has only the most powers expressly delegated to it by the State and it would be unconstitutional if that is the purport of that statute.

THE COURT: In other words, it must really regulate commerce.

MR. GILLEN: Yes. This is not the type of case that our founding fathers could have possibly

meant to be delegated to the Federal Government.

THE COURT: They hadn't heard much about this type --

MR. GILLEN: They knew about construction and they knew about extortion from the British Government. That is something they knew.

In addition, I will respectfully move to strike the testimony in toto of Harold Goberman on two grounds; one is spoliation of evidence, he failed to produce his books and records; secondly, his complete disregard for the oath.

In his own sworn testimony, the oath means nothing to this man. He has called different kinds of oaths for various occasions.

To him the truth is absolutely meaningless.

I submit that the man has not displayed -- although I am not a psychiatrist -- psychiatric disorders from the witness stand where there's complete inability to distinguish truth from fiction.

I must respectfully submit on that basis his whole testimony should be stricken.

In addition thereto, most respectfully, I move that the Court direct a verdict of acquittal on the evidence in the whole case, as not being that

type of evidence upon which a jury in an American court room could find a verdict of guilt beyond a reasonable doubt.

Because in truth and in fact if there is a case here at all the case goes on the credibility of Harold Goberman.

There is some alleged corroboration but in truth and in fact the very corroboration that is there doesn't hold water when analyzed.

It is all as a result of Harold Goberman. His brother Harold Goberman has come inot the court room and before this Court has, having short of saying "I will stake my life, " when he introduced Mr. Alphonse Merolla, Mr. Leone's client, and he did that before the Court.

It shows there -- I don't like to say -- maybe it's inherent in the Goberman family that the truth is absolutely meaningless.

That in truth and in fact Mr. Goberman has -- as we know here had "faked an insanity in an examination." The real question is did he fake to get in or to get out?

Or does he know if he ever had a true real psychiatric examination. The man is incredible.

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As I say, as a matter of law and as a matter of fact, that the evidence produced by the Government falls short of any permissible criteria to submit to a jury on a question of fact beyond a reasonable doubt as to guilt or innocence of any citizen.

If the devil was on trial this man wouldn't be a competent witness.

THE COURT: Not on the basis he was turning evidence against an old friend.

MR. GILLEN: Even with the devil -- even the devil had redeeming values. He hasn't any. Because at one time the devil was at the right-hand of God. We see no redeeming values with Mr. Goberman.

MR. RITCHIE: Thea was testimony that he was the type of guy that would go up a tree to get a cat.

MR. GILLEN: When I was with the Government, I once said the Government would have called God as a witness before he fell.

The Court stopped me. They thought I was going too far.

THE COURT: I think that might have been going a bit far.

MR. GILLEN: In truth and in fact, Mr. Goberman displayed not a single redeeming feature.

MR. LEONE: For the record, on behalf of my client Alphonse Merolla, I move for a directed -- a judgement of acquittal.

THE COURT: I assume that each of you has moved for judgment of acquittal.

MR. LEONE: For the record, I have stated previously my reasons and I know your Honor has thought long and hard on it and I think that because the testimony of Harold Goberman is the only testimony in this case, in this conspiracy case to commit extortion, I think it should be dismissed.

I need not point out that there are no statement made by Alphonse Merolla to anyone. He was never seen on the job site by anyone. Even Allen Goberman's testimony was merely -- merely puts him present in a room on June 5th if the Court chooses to believe that testimony.

Mr. Goberman's mere statement at one point in the trial that yes, he beat me, period, is the only testimony that holds this man in this case. I heard your Honor's ruling that you wish to reserve decision on it.

I would urge your Honor possibly not put this man through waiting for a jury's verdict in this case.

THE COURT: I don't like to --

MR. LEONE: If it is a simple assault, and I don't mean to be presumptious, but I have very little belief that the prosecution, and I was a prosecutor for five years, I have little belief that the government would prosecute this case only against this defendant, had he been indicted alone.

I guarantee -- I shouldn't say that -- if all are acquitted he would not have been tried alone.

The danger that I am afraid of is that going to the jury they might say either all are guilty or none are guilty.

If you can see your way under Taylor, I know your Honor is familiar with that, if you can see your way clear to grant the motion I think in the interest of justice the case should not go to the jury because there is no way a reasonable person, if they are directed to scrutinize the evidence in this case, and hold that solely against this man, can find there is not a reasonable doubt as a matter of law.

THE COURT: I will reserve decision against Alphonse Merolla as well as against Thomas McNamara.

MS. SELTZER: On behalf of Alphonse M. Merolla I move to -- pursuant to Rule 29 and adopt

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that the arguments made my co-counsel.

THE COURT: Decision reserved with the same footnote.

Can we have them come in and put the stipulation on?

MR. RITCHIE: Yes.

THE COURT: Then a statement about the testimony of Timothy Shea, et al, then something about the non presence of the other three.

MR. RITCHIE: Mr. Meiselman asked for a moment.

MR. MEISELMAN: I had asked for two things, first I want to go out and then I want to call to your Honor's attention that it is 3 O'clock.

THE COURT: I don't care, we are going ahead, please.

(Recess taken at this time.)

(Cont'd on next page.)

Meiselman -

(At 3:15 p.m. the trial resumed without the presence of the jury.)

MR. RITCHIE: Your Honor, I am making a motion.

Your Honor, I move to strike the check for $20,000 dated June 28th on the ground that it has not been connected to the evidence in this case or to the facts in issue in this case.

MR. GILLEN: If your Honor pleases, if I may, on that we have the testimony of James McNamara giving the money to John McNamara, who went into the room.

Now, at the beginning of this case it was announced that it was the intention of the Government to grant immunity to John McNamara and call him as a witness. Now, we had every intention in the world, and I was waiting for any given day during this two-week period of time, but there was not a word said about John McNamara until last Friday afternoon and that exhibit was put in through Mr. Koch, the last government witness.

Now the Government is complaining that we haven't produced John McNamara when it was announced intentionally that they had severed against him and

to bring him in and we had every reason in the world to believe that the Government was going to do precisely what they said they were going to do, and that is bring in John McNamara, and they never did it, and I submit that that exhibit should not be stricken.

MR. RITCHIE: The Government announced its intention not to call John McNamara --

MR. GILLEN: Yes, on Friday afternoon.

THE COURT: The evidence in the case is that the defendants were able Friday night, at the end of the case, they were able to and did not either tender or deliver this $25,000 but instead coerced Goberman to sign a receipt without getting the money, give the receipt without getting the money.

MR. RITCHIE: What is your Honor's ruling on my motion?

THE COURT: And you asked him whether he saw that $25,000 again later and he said yes.

I don't see what you are kicking about. I decline to strike it.

MR. RITCHIE: Yes, your Honor.

MR. GILLEN: Thank you, your Honor.

THE COURT: Mr. Meiselman first?

MR. LEONE: Yes, your Honor.

You were going to read certain stipulations.

THE COURT: Yes.

Have the jury brought in.

(At 3:20 o'clock p.m. the jury took its place in the jury box.)

THE COURT: Members of the jury: The parties have stipulated as the fact that the defendant Alphonse Merolla, that is Mr. Leone's client, was not included in the indictment at the first trial; that he was not seated at counsel table during the first trial nor present in the courtroom during that trial.

Now you will recall also this testimony, I believe, that is the testimony of Timothy Shea, of Miss Sandra DiNunzio and certain of the testimony of Mr. George Koch, and Koch was the man from the Marine Midland Bank, and certain of the testimony of others with relation to the existence, filing and search for the original of the contract cancellation.

Now, if you come to consider and evaluate that evidence in your deliberations, that evidence was received and would be relevant only as against the defendant Thomas McNamara.

Now there has been reference in the evidence

to Messrs. John McNamara, Angelo Merolla and Rocco Merolla, and they are not here on trial. You will notice the presence of John McNamara's name in the indictment.

The case of each of these three gentlemen is subject to separate disposition and no inference for or against either side is to be drawn from that fact.

Now, Mr. Meiselman.

Oh, could you step up for just a minute, gentlemen, and, Mr. Karr, could you come here, please.

(The following occurred at sidebar without the hearing of the jury.)

THE COURT: My clerk has said that he is not sure that you gentlemen rested in front of the jury.

MR. FISCHETTI: We did not, but we waive that.

THE COURT: All right, okay.

MR. MEISELMAN: It was my understanding, and -- I am sorry --

THE COURT: Go ahead, what?

MR. MEISELMAN: It was my understanding, and perhaps I am wrong, that the stipulation would have been that because of legal reasons, neither John

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McNamara nor Angelo nor Rocco would be available to any of the parties.

THE COURT: No, no, there was no agreement on that, that blew up.

If you want to separately consider that, go back and then tell me.

Perhaps you can do so.

MR. RITCHIE: Perhaps we can include that in the charge.

THE COURT: I would put it the other way around, that there was no evidence on the availability of their testimony to anybody in the case and therefore no inference can be drawn about who if anyone their testimony might have served.

Now, strictly speaking, there has to be some indication in the record that the witness is available and there isn't, for all we know they may be in Europe.

MR. MEISELMAN: Well, would your Honor do so?

THE COURT: What?

MR. MEISELMAN: Would your Honor do so?

THE COURT: If you fellows tell me later.

All right, gentlemen.

(The trial then proceeded within the hearing of the jury.)

6 Summation by Mr. Meiselman

MR. MEISELMAN: May it please the Court, Judge Dooling, my brethren at the bar, Forelady Kirsch, ladies and gentlemen of the jury:

We have reached the stage in this trial where it is now my responsibility for the last time to present to you Thomas McNamara's defense and attitude in this matter.

It is late and perhaps my delivery may not be as striking as some of my brethren at the bar and I beg your indulgence, but I also ask for your attention:

This will be the only time that I can address you and it is a responsibility that I have to address you.

We each of us have our responsibilities, his Honor, the Judge, to regulate the trial; counsel to represent and protect the rights of his client, and Mr. Ritchie's job is to prosecute.

But you alone have the awesome burden as triers of the facts to determine the fate and the future of Thomas McNamara.

We have been on trial, I believe, -- well, this is the tenth day, and although most of us say we remember the facts, it is sometimes difficult in

7 Summation by Mr. Meiselman

a courtroom with no windows, where we don't know what the weather is, to not confuse Tuesday and Thursday, and it is my function to call your attention to certain salient facts which I think are very pertinent and relevant in your deliberations. If I give you facts which are different from your recollection or if anybody else gives you facts different from your recollection, then it is your memory which will serve and his Honor will instruct you.

I cannot now in the space of the time allotted to me reread the entire record to you, but I can try in the space of time to read certain portions which I think highlight the testimony here.

Appearing in this courtroom here pursuant to an accusation is Thomas McNamara, the United States Government against Thomas McNamara, and it can be inferred that two hundred million Americans in rough have risen simultaneously and point to Thomas McNamara and said:

"You are guilty of what we say."

In practically and in reality, that is not so, it is merely an accusation made by a Grand Jury outside the presence of the defendant and where he

8 Summation by Mr. Meiselman

had no opportunity of defense or cross-examination. Indeed, and please forgive me, indeed, if I may say so, Mr. McNamara is a victim rather than a defendant.

The complaining witness, the chief witness in this case, the way the entire case arose, around which everything revolves, the cornerstone, the keystone, the archway is Harold Goberman, if we wish to call him by that name.

I don't want to go through all of this background because I think that most of you already have heard it yourselves, but merely to recollect it to you: he is a twice-convicted felon, he has been convicted of grand larceny and he has been convicted of hijacking in which he planned by false alarms with a .45 automatic to rob and hijack a truck; that he feigned insanity and was committed for observation to the Kings County psychiatric ward to avoid a court appearance.

And that he conspired and concocted a plan to commit murder -- and I would like to read to you one short paragraph from the synopsis that Judge Dooling read to you at the beginning of Mr. Goberman's cross-examination, and the Judge read page 385, and

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I quote:

"Mr. Goberman testified that at a series of meetings on various dates, Sommers and he conjected a plan to kill Irving Silver, the mechanics of which would be that Mr. Goberman, who knew how to start an automobile without using a key by simply short-cutting the panel and going directly from the core to the battery, would steal an automobile, that Mr. Sommers would inveigle Mr. Silver to go with him to a place in which Mr. Silver in one way or another would be pushed in the path of a moving stolen vehicle and be run down."

If a man can state that he conjected a plan to murder and that he feigned insanity to avoid a court appearance, can he conject the testimony he gave on the stand where his motivation, as we shall soon see, was greater than merely avoiding a court appearance?

His aliases are a way of life, he swore falsely for a driver's license and he swore falsely for a pilot's license.

He has used a different Social Security number on each job.

His corporations owe over $150,000 to his

creditors, among the various named, and he takes different oaths for different reasons. He will swear one day that an oath means one thing to him in one place and he swears another day that it means another thing to him in a different place.

This is a man who says to you, I swore falsely because I needed a job, and perhaps that is understandable. It is the very man who in the next breath testifies that he spends over a thousand dollars a year on clothes and doesn't wear a suit more than ten times.

MR. RITCHIE: Objection, your Honor, that wasn't the testimony.

THE COURT: No, he was asked if he said that on an earlier occasion.

MR. MEISELMAN: The Government charges a conspiracy here and they claim that Mr. McNamara and the other defendants are in a conspiracy because they were together, and we shall reach that in a moment. But what if the other defendants than Mr. McNamara were with Mr. Goberman for reasons other than that which had anything to do with Mr. McNamara?

And I call your attention to page 661 of

the record at line 22, in which Mr. Goberman said:

"Q Did you ever have any business dealings with Al Merolla?

"A Yes, I did."

And at page 662, line 5:

"Q Did you discuss any of those business dealings in a restaurant?

"A Yes."

At page 728, line 6:

"Mr. Doberman, you told us yesterday that you had business dealings with Al Merolla between the dates of June 5th and June 28th, 1972. Did those business dealings have anything to do with the McNamaras?

"A No, it did not."

And at page 562:

"Q Under what circumstances did you first meet Alphonse Merolla?

"A To the best of my recollection, I saw him before June 5th when he was employed as a salesman."

MR. RITCHIE: Objection, your Honor, that was not his testimony.

MR. MEISELMAN: I beg your pardon.

(Addressing Jury): He stated previously under

oath, and the full thing should read as follows:

"Q While you were under oath and on November 26, 1973 were you asked the following question and did you give the following answer?"

And then there is the question and answer I just gave you which were read to him, and thereafter he was asked:

"Q Were you asked that question and did you give that answer?

"A Not to my knowledge.

"Q Yes or no?

"A If it is in the record, yes, sir, but not to the record, I didn't see him before June 5th," whatever that means.

But we remember, do we not, and we will quote again the testimony of his brother Alan, who also testified that they had business dealings with Mr. Merolla other than that which had anything to do with Mr. McNamara.

When openings were made to you, ladies and gentlemen, you were advised that there were different kinds of evidence, written and oral. The record in this case is somewhat confusing, that is the records as to who did what on this construction job.

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The records, the books of account of Mr. Goberman and HarMac could have been perhaps illuminating, but you heard that they were in Carolina, whether it is North or South I don't remember at the moment, and that he put them where when he was there for several months, and I think in words or substance he said it was to get them away from some people and he did not further elucidate, but there are written records that we were able to incorporate, Defendant's Exhibit P, a letterhead by Len-Al Construction Company, on their letterhead, which indicates the date of February 4, 1972, and this is addressed to Thomas McNamara, and in which it says:

"We propose to construct the automobile sales and service building," and it then lists the payment of money that they propose to do it for, Len-Al Construction, and bids were accepted in the name of Goberman and Len-Al.

Now Defendant's Exhibit C is a proposal for the electrical work by Merkel Electric to Harry Goberman. Witnesses have testified that he told them they were doing the job for Len-Al, and that at some future date he said he wasn't, but Len-Al was supplying the carpenters on the job and they were

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paying the carpenters on the job, and perhaps there was a reimbursement to Len-Al, but since we haven't seen the books and records of each we don't know what those records reflect.

(Continued on next page.)

4/1 MP

Mr. Goberman had no personal resources for this job. None.

Mr. Frieda(ph) said he was told that he had $50 to start the job with.

Mr. Goberman didn't even have the resources to buy a trailer. And I read now from page 563, line 8:

"Question: At the time you purchased this trailer you had no personal resources to buy it, did you?

"Answer: That is correct, sir.

"Question: Were you asked these questions and did you give these answers:

"Sir, approximately when did you purchase this trailer?

"Answer: Approximately March 1972.

"Question: At that time did you have the personal resources necessary to meet, to buy this trailer?

"Answer: No, I did not.

"Question: Did you borrow the money?

"Answer: Yes, I did.

"Question: From whom did you borrow the money?

"Answer: Mr. McNamara."

Indeed, the only sheet that could be found with

respect to the ledger of Mr. Goberman was Defendant's Exhibit U, in which, up until March 27th he put down the moneys given to him by Mr. McNamara. Stops. Most of the items just say, "Paid," except for March 15th, there is an item of $1600, and it says, "Trailer." He has no financial resources for the job, and can best be shown also at page 609 of the record, and I read:

"Question: As a matter of fact, you had and your corporation had no financial resources for this job of any kind?

"Answer: That is correct.

"Question: And the moneys that you received on the requisition you put into the bank account of HarMac?

"Answer: That is correct."

Out of those moneys, ladies and gentlemen, he was paying his girlfriend.

"Question: Was Janet McCarthy doing any work on this construction site?

"Answer: No, sir, she was not.

"Question: Did you pay her out of the HerMac account?

"Answer: Yes, I did give her checks."

Meiselman-summation

The record reflects, ladies and gentlemen, from the testimony, Mr. McNamara was treating Mr. Goberman like a son, and that it further reflects that in May of 1972 Harold Goberman started slowing down construction and putting fewer men on the job.

At page 575 of the record:

"Question: Did you tell Agent McMullen that starting in early May of 1972, you started slowing down the construction and assigning fewer men to the job?

"Answer: Correct."

Going through the events of June 5 -- and I think, ladies and gentlemen, the case basically revolves around the events of June 5 and June 28th, those two dates -- we had all kinds of testimony on direct which nevertheless broke down not in volume but in quality to very little on cross-examination.

Page 612:

"Question: There was no threat in the trailer, was there?" This is Mr. Goberman.

"Answer: No physical threats, no, sir, at the trailer."

And then he recalls what he calls his Rabbi, Mr. Salvatore Spadarella, who Mr. Goberman now tells us is in jail for extortion. He would have us believe he didn't know him very well except on cross

he was shown to have socialized with him.

He knew that Mr. Spadarelli was in the rackets, he was a racketeer and he owes Spadarelli money, $7,000 or $8,000. It is the same Spadarelli who was involved in the Silver Somez murder, and he calls up Mrs. Spadarelli on the telephone and within a short time Mr. Spadarelli shows up, the same Mr. Spadarelli that Detective Thomas Gill testified he saw at the job site on three separate occasions in conversation with Mr. Goberman.

He would have us believe Thomas McNamara threatened him.

May I read from the record at page 587:

"Question: Were you asked this question on December 24, 1972, and did you give this answer:

"Question: How about McNamara, Thomas McNamara, did you ever talk to him?

"Answer: Specifically the threats. I couldn't say yes or no. Just a lot of heated words.

"Question: Were you asked that question and did you give that answer?

"Answer: Yes, I did give that answer.

"Question: Was it the truth?

"Answer: Yes, sir, it was."

Mr. McNamara did not threaten Mr. Goberman. As a matter of fact, despite what Mr. Goberman meant to imply, and from the evidence it is a fair inference he was attempting to con everybody here, as he has all his life. He remembers none of the conversations with Mr. McNamara except vaguely.

Again may I read from the record at page 594:

"Question: On January 8, 1974, approximately five or six months after defendant's Exhibit V is dated, were you asked under oath this question and did you give this answer:

"'Question: Do you remember any of the conversations you had with the defendant Thomas McNamara at the job site?

"'Answer: Vagusly.'

"Were you asked that question and did you give that answer?

"Answer" That is correct, sir."

Then he takes us to Chuckie's Charcoal. As a matter of fact, the record indicates that it was Mr. Goberman who made the appointment to meet with Mr. Spadarelli at Chuckie's and that as a matter of fact at Chuckie's they only discussed generalities. And that he was told to go ahead and do the job, not to get off,

but to do the job.

May I read to you, ladies and gentlemen, at page 614:

"Question: Isn't it a fact that at Chuckie's the job was only vaguely discussed?

"Answer: In what reference do you mean, 'vaguely discussed'?

"Did you use the word in testifying earlier when you were at Chuckie's the construction job was only vaguely discussed?

"Answer: I assume so, sir.

"Question: Is that a fact, that it was only vaguely discussed at Chuckie's?

"Answer: That is correct.

"Question: And the rest of the conversation was just generalities; is that correct?

"Answer: That I was involved in, yes, sir.

"Question: While you were there the only discussions were generalities?

"Answer: That is correct.

"Question: And were you not told at that time in words or substance that you were to do the job and you would be compensated?

"Answer: That is correct, sir."

We heard this testimony. Dotti Tomaselli and Alec Gniazdowski. It's up to you, ladies and gentlemen, to determine the credibility of witnesses as they appear before you, because you have among you hundreds of years of combined experience in your everyday lives where you make your daily decisions and where when you look at people you arrive at conscious or subconscious opinions ofthem and their mannerisms and the way they speak to you. And you can equate that experience in viewing the witnesses in that chair as to whether they are telling the truth or they are being evasive. And you can evaluate their motivation.

Dottie Tomaselli and Alec Gniazdowski came into that room after Mr. Goberman says he was beaten on June 5th. They saw no marks on him.

This was a room that was connected to another room with an archway or passageway with no door. This was a room in which Dottie Tomaselli and other people had their office in outside rooms which connected with this. It was a public office of this company. People walked in and out. There was no privacy in the strict sense.

Mr. Goberman claims he was beaten on that day,

and he said he threatened him, but they never told him to get off the job.

As Mr. Desmond O'Sullivan said, the sole objective of Mr. McNamara, was to get this job done. Let me quote Mr. Goberman at page 608:

"Question: Now, on June 5 did any of the defendants in this case tell you in words or in substance that they wanted you off the job?

"Answer: No, sir, they did not."

As a matter of fact, what they did say to him was even more illuminating from the testimony on page 623. Not only did they not tell him to get off the job, but the questions and answers say as follows:

"Question: On June 5, in Mr. McNamara's office, were you told in words or in substance to finish the job on time?

"Answer: Correct.

"Question: Were you told in words or substance to stop playing around?

"Answer: That is correct, sir.

"Question: Were you told in words or substance to do what had to be done to finish the construction of the job?

"Answer: That is correct, sir."

He testified that when he went there were approximately ten people in the outer room.

Page 622:

"Question: On November 27, 1973, were you asked the following questions and did you give the following answers:

"'Question: Were they men or women?

"'Answer: Both.

"'Approximately how many people were there?

"'Answer: I do not know.

"'Question: Two, one, five, a dozen, how many approximately?

"'Approximately ten.'

"Question: Were you asked those questions and did you give those answers?

"Answer: Yes, I did."

Ladies and gentlemen, if I were or you were to assault somebody and bet them with blackjacks, with guns, would you do so in a public room open to view to a clerical and billing office that was right next door, open to anybody that could walk in? It just isn't logical.

Now, the question of the check. He said that John brought in a check. John McNamara. And that

he signed it. And he said there was no checkbook in the car when they went to look for it. He said he was there about a half hour and he said that he was black and blue all over. On June 5th.

MR. RITCHIE: Objection. That wasn't the testimony.

MR. MEISELMAN: I refer you, sir --

THE COURT: If you have it handy, would you read it?

MR. MEISELMAN: Yes, sir, I have it. Pages 314 and 316:

"Question: John said, 'So he said of him, make a check out.' I said I did not have a check. Then he sent out for a check and it was brought in to me and I was told to make it out."

At page 321, top line: "I then opened the trunk. There was no checkbook in the car."

Page 468 and 470, he testified on page 468:

"Question: Did you have black and blue marks on your head?

"Answer: I was black and blue all over, sir."

Page 499:

"Question: How long were you there at McNamara Buick?

"Answer: Approximately around a half hour."

That's what he testified to. Cross-examination of this man, who wants you to believe that he sat there meekly and frightened, not answering anybody, first it comes out on cross that he went to punch Mr. McNamara, Thomas McNamara. This man who did nothing wrong at the conference.

He testified that his brother went to the bank with him. You heard Aallan Goberman. He said, "I sat on a fence with somebody to watch, and I didn't go to the bank."

Harry Goberman said the same thing until cross-examination. He said originally that John McNamara went to the bank with him. His testimony is somewhat different on cross-examination.

(Continued on the next page.)

MP:GA
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"Question: On September 25, were you asked the following questions and did you give the follo ng answers, on line 23, page 198:

"'Question: I am not interested in what you were told, I am asking you what you did?

"'The Witness: I was told to go down to my car and get my checkbook, which I said I didn't have on me. I went down to the car, accompanied by Al Merolla, John DeLiso, and Allen Goberman, and got my checkbook, and thereafter, went to the bank.

"'Question: Did you make this statement while you were under Oath?

"'Answer: Yes, I did.'"

Now, page 618:

"'Question: Who accompanied you to the bank?

"'Answer: John DeLiso, Alphonse Merolla, my brother, and myself. There were four of us in the car.

"'Question: Were you asked that question, and you give that answer?

"'Answer: Yes, I did.'"

There was no mention of John McNamara.

I will go through the question of the funds with respect to the trailer and registration in just a moment, but, Ladies and Gentlemen, you may recall Desmond O'Sullivan

testified that on June 8th, three days later, after they were trying to get allegedly from Mr. Harold Goberman, as he testified, $1300 in money, and the trailer which Mr. McNamara loaned him the money to buy, Desmond O'Sullivan went to his office, this is LenAl's office, to Harold Goberman, with John McNamara, and they gave him a check for his payroll for $2446.

The payroll which was to be met is signed by G. Taibbi, for the sum of $2446 for the week. A check we will show you is in evidence was given to Mr. Goberman for $2446.

Desmond O'Sullivan testified it was a warm day. He was, Mr. Goberman, was in a T-shirt and slacks. He say no evidence of any injury. It was a friendly conversation, and the discussion was on how to make arrangements to get the payments to him so he can get his payroll, and go on with the job.

Mr. Goberman made no complaint, he had never seen a doctor on June 5th, or thereafter, until quite a bit later. Why give this man $2446 on June 8th, and beat him up to get $1300 on June 5th? Why?

Now, let's talk about money for a while. This job was under a contract, and pursuant to the contract, the builder or contractor would make requisitions, signed

by the engineer or architect, and on the basis of those requisitions, monies would be paid. Okay.

Requisition number one was dated April 27, 1972, in the sum of $54,000.

Requisition number one, check of Thomas McNamara, $54,000.

Requisition number two, dated April 28 --

MR. RITCHIE: Mr. Meiselman, excuse me. Could we have citations by Exhibit numbers?

MR. MEISELMAN: Yes, sir.

I referred before to a requisition which is Defendant's Exhibit AA, and a check which is part of Defendant's Exhibit AD.

Requisition number two, Sworn to April 28, 1972, in the sum of $102,814. Exhibit AB.

Requisition, check $102,814, paid.

Requisition number three, June 1, 1972, $32,610. Defendant's Exhibit AC. Check, Defendant's Exhibit Z, $32,610, paid.

When was this paid? Desmond O'Sullivan testified that he went to them with this check, and delivered it to him on June 15.

Now, would we beat up a man, would Mr. Thomas McNamara beat up a man, on June 5th for $1300, and pay

him $2446 on the 8th? And pay $32,610 on the 15th? Why?

As a matter of fact, Harold Goberman acknowledges on the paper, "We did get loans."

Defendant's Exhibit AF, he said, received $1,700 loan for our payroll May 16th from Thomas McNamara, repayable on receipt of requisition number two, signed Harry Goberman, and on Defendant's Exhibit AE, dated June 8, he acknowledges that there were no requisitions due further than the ones he was paid. This is an amendment to the contract. May I read it to you?

It says, "Amendment to construction contract" on top. The other words you may read for yourself. It says, "In consideration of Thomas McNamara, individually, and McNamara Re New Cars, the owner, 2446, pursuant to two requisitions for payment to the owner on June 1, 1972, in the amount of $48,000. None of which is presently due per the terms of the agreement dated February 24th," et cetera, et cetera.

He said he will apply the $2446 when the requisitions will become due.

Well, Ladies and Genelemen, the testimony here, the evidence here, and you have the checks. You may see them (indicating). You may look at them. You may count them. And you will find, unless I am bad at my arithmatic,

that as of June, Mr. McNamara had advanced to Mr. Goberman loans outside of requisitions I already talked about, of over $29,000, and here are the checks (indicating), of which only thirteen has been repaid. And there was approximately fifteen or sixteen thousand dollars still due in loans from Harry Goberman. And that is why Harry Goberman said on June 5th, that he had received the money -- signing over the trailer, in order to repay the $1300 loan. Here it is, Defendant's Exhibit AN.

"I, Harry Goberman, am repaying a debt of $1600 without interest for one trailer that was purchased by Thomas McNamara, and put in my name, Harry Goberman, for use on the McNamara Buick-Pontiac Incorporated --" It says "joy" --It should be job site -- by returning the trailer ownership to Thomas McNamara, June 5, 1972," signed Harry Goberman, and notarized Alec Gniazdkowski. That is why the trailer was given to Mr. McNamara.

After June 5, there is no question but that Mr. Goberman continued on the job site, and he continued on the job site after that. This was a man who said, I was beaten on June 5th. June 6th, he goes to the job again. Nothing had happened. He just goes to work.

June 8th, he gets money. June 15th, he get money. And so it continued up until the 20th of June,

and on June 20th, the town of Brookhaven posted the building. They put a notice on the building. And that notice said, "Do not continue with construction or use of the premises, under penalty of fine and imprisonment or both." And it was signed Town of Brookhaven, Building Department, Inspector R. Klein. That's Defendant's Exhibit D.

Mr. Taibbi, in his notes, says he was told on June 20th by the Inspector not to continue. He also said that on -- Although he was sweeping up until June 24th, on and after June 24th all work stopped on the job.

Mr. McNamara sent a letter terminating the contract. Oh, I have found my notes. The exact amount, totalling the checks, and you check me, is $29,599, of those loans. Check me to see if I am wrong.

And, the 24th, Mr. Goberman admits that he received a notice of termination from us.

MR. RITCHIE: I object to the use of the word "us."

MR. MEISELMAN: When I say "us," I am not referring to me. I am referring to my client, Thomas McNamara, and McNamara Re New Cars.

Please read this letter (indicating). See for yourself that we sent Harry Goberman a notice of termination on June 24, 1972. The building has been posted. We

told him we were terminating.

Now, he says that on June 28th he was beaten again. And he was frightened silly. He was so frightened that he would do anything. He was so frightened he was afraid to go to the Police when he left there. He was afraid to go to a hospital when he left there. He was scared. If he was beaten badly, that is a fair enough assumption, that he was scared. But you remember his testimony, Ladies and Gentlemen, he didn't know where he was that night. And he had no recollection of the next two days, except that he was so frightened of what Mr. McNamara and everybody else would do to him, that he nevertheless, not going to the Police, not going to the hospital, and knowing these people could do something drastic, he wrote Mr. McNamara a letter on June 29th, the day after. The man of whom he was so frightened.

And he said to Mr. McNamara, in effect, I am terminating the job. Here is the letter, Defendant's Exhibit T, dated June 29th, 1972, signed by H. Goberman. And he said, I want money. I am terminating the contract. Read it yourself. He doesn't know who prepared it. He doesn't know who typed it. He doesn't -- He had no recollection about it at all till he was shown this letter,

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and this is the letter of a frightened man who was so frightened on June 28th he wouldn't go to the hospital, but on June 29th, he is no longer frightened, and sends a letter demanding payment.

What is the difference between June 28th and June 29th? A few hours? An evening? Why was he not frightened on June 29th, after he was so frightened on June 28th? He did testify that the job was posted, and since the job had been posted, no work was done on June 28th.

You remember Mr. Taibbi's testimony, Harold Goberman told him to stick around and report what was happening. And so the Superintendent passed by the job site several times a day, or parked his car across the street, and wrote a report to Harry Goberman that nothing was doing on the job.

EK fls

(continued on next page.)

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T5R1 RM

MR. MEISELMAN: (continuing) Alex Gniazdowksi and Dottie Tomaselli were there on June 28th, and do you doubt their testimony, you had occasion to observe them, they didn't see a mark on him.

Dottie didn't see a rip in his coat, she knows him, she had seen him there before, he was sitting there, he discussed this contract termination with John, he discussed the changes, he says, he mentioned he read it, and he signed it. He has testified that after he signed this paper, and John McNamara left the room, they got -- Oh, that a cab was called for him, and Dottie Tomaselli testified that she was told to call the taxi for Mr. Goberman, and she did, and that after she called the cab, she went downstairs, and as she was going downstairs, she heard footsteps behind her, and Mr. Goberman was coming behind her, and that she was in the room where she had a vision of the hall and the street, and that he stood there for a little while, and the cab came, and he got into it, and he then testifies that he went to the Pioneer Diner, got out of the cab, went into the diner, got some cigarettes, and then -- and I use the word advisedly, because this is the word the Mr. Goberman used -- He jumped into his car and took off. He was thereafter stopped by the Police.

Now, you heard Detective Pavese, that is one of the gentlemen who stopped him, Detective Pavese saw no marke on him, he saw nothing wrong with his clothing, and it was only until -- Well, it was not until Mr. Goberman called Detective Pavese's attention to him, did he notice a limp. How difficult is it to feign a limp? Let's discuss that for a moment.

He stated that he wasn't sure whether he was limping when he left the McNamara's, but that at the Police Station, he had a slight limp.

Page 400:

"Question: You told us here that you were limping when you left McNamara Buick: right?

"Answer: At that precise time, I don't know if I was limping, but I was limping when I reached the Police Station.

"Question: What about when you left the Police Station, were you limping then?

"Answer: Yes, sir, I was.

"Question: Badly?

"Answer: I don't know what you consider badly.

"Question: Well, was it noticeable, like this, that you were limping? (Indicating)"

And I think you may recall Mr. Goberman, when he

was asked that question.

"Answer: I would say a slight limp, not what you are just doing.

"Question: Was it like this, just a slight limp?

"Answer: That is correct, sir."

Now, please remember this for a moment:

He wasn't sure whether he was limping when he left McNamara's and he had a slight limp when he got to the Police Station. As a matter of fact, it appeared to be so slight that he had to call the Police Officer's attention to it, you see.

Now, as to the evidence that his shirt, the buttons had been ripped off his shirt, you heard me ask the Police Officer:

"Was anything wrong with the shirt?

And he said, "No."

He says that his jacket was ripped under his arm, the Police Officer didn't see it.

It seems only that Harold Goberman's friends and people who support in his motives see the things they want to see, because despite the fact that Mr. Goberman, Harold Goberman, said he had a slight limp at the Police Station, Mr. Taibbi said that he was so bad I had to

help him into his car, and Mr. Harold Goberman, forgetting when he was telling the truth, or when he was in fantasy, or in reality, was called before the Grand Jury to give his testimony concerning an indictment which the Grand Jury would consider handing up against Mr. McNamara, he told the Grand Jury that he was so bad, he was crawling --

MR. RITCHIE: Objection, objection, that wasn't so.

MR. MEISELMAN: I quote from page 402.

THE COURT: What is the correct reference?

MR. MEISELMAN: I quote from page 402.

MR. RITCHIE: My objection, your Honor, is that it wasn't the testimony involving the indictment to Mr. McNamara at all.

MR. MEISELMAN: Well, he wasn't there playing games.

MR. MEISELMAN: (Addressing Jury) Page 402:

"Question: Mr. Goberman, on September 12, 1973, did you testify in a Grand Jury, and were you asked this question, and did you give this answer, on page 6 of September 12, '73, by Mr. Ritchie:

"'Question: It's just a question of how severe you were limping, you believe that you were limping to

the point where you were almost crawling; is that correct?

"'That is correct.'

"Were you asked that question, and did you give that answer to the Grand Jury?

"Answer: Yes, sir, I did."

And then the question:

"Question: Were you almost crawling?

"Answer: No, sir, I was not."

But the Grand Jury heard that this man was almost crawling.

Now, he had his lawyer, and he was hurt so badly, but he was not driving to his home, he had his lawyer drive him to LenAl's office, where his wife and his sister-in-law were, and he says that he went through the telephone book looking for a doctor.

Now, Ladies and Gentlemen:

Search your experience, have you ever tried going through a telephone book looking for a doctor from A to P? How many pages, how many names, how many lines to you have to look for a doctor?

Is it possible that that is the way you would get a doctor, even in the Suffolk County telephone book, let alone Manhattan?

He says that he got to the doctor about 2:00 o'clock in the afternoon.

Page 395:

"Question: What time did you go to this doctor?

"Answer: Approximately around 2:00 o'clock.

"Question: About 2:00 o'clock in the afternoon?

"Answer: That is correct."

Two o'clock in the afternoon.

Now, times goes, and perhaps you can make a mistake in a half hour, fifteen minutes, an hour, even two hours, but you will remember the testimony of Dr. Ponturo, who says that he saw a man who told him he was Harold Goberman, and he said he saw him about 8:30 or 9:00 o'clock that night.

Where was Harold Goberman all that time? For the next few things, he couldn't remember where he was at, at least he couldn't remember to tell us where he was.

Now, he remembers all the events, and remembers the doctor, but after that, for some reason or other, he didn't remember where he was.

Well, you remember the bill of particulars, that was offered in evidence, and he said that he was in bed for a few days.

If you were in bed for a few days, Ladies and Gentlemen, I think you would remember where you were.

As a matter of fact, he was so impressed with his own injuries that he looked at his face for the first time in the evening of June 28th and he saw no bruises, he himself.

(continued on next page.)

EK:GA
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MR. MEISELMAN: (Addressing jury.)

Page 628:

"Question: And you didn't look at your face until that evening?

"Answer: That is correct.

"Question: When you looked at your face that evening, did you see any bruises or bleeding on your face?

"Answer: No, it was just sore."

Here is a man who received a beating, he says, in the morning of June 28th, and doesn't look at his own face until the evening of June 28th, when he himself even admits there were no bruises.

But we do know, and it was brought on on cross-examination that in April of 1972, as he testified, he fell asleep in his car in a garage, and that the car drove through the garage wall, and he woke up on a hillside someplace. The car wasn't so badly demolished, he said, and he didn't receive any injuries.

Well, Ladies and Gentlemen:

We have offered, and there has been received in evidence a document for the repair of that car, and I invite you to look at Defendant's Exhibit W, and to read it. They had to replace the windshield, the hood,

the fenders, and when he got to Doctor Ponturo, please remember that this man Goberman is a chronic conjector of plans, a schemer, a man who makes believe, but he says he is also readily identifiable, and why, because on one arm he has a seven inch panther tattooed, and on the other arm, he has wings and U.S.A.F. on it.

Now, he says that the doctor looked him over and gave him a statement, and that statement is in evidence, and I invite you to look at it.

Here is the statement of the doctor who examined this man, who testified that he was just beaten by blackjacks. The doctor says he has erythemia, and you listened to me examining the doctor, and you heard the doctor agree with me when I read the definition of erythemia, that it is a redness of the skin. It wasn't even black and blue, because the doctor testified that black and blue marks are more severe than erythemia, which is a redness of the skin.

Then he wished to create in your minds that he received medication, he says that the doctor gave me a prescription, he doesn't know where he filled it out, but it was someplace on Log Field Road --

MR. RITCHIE: Objection, your Honor, he was asked a question, and he said he was talking --

THE COURT: There is some testimony in that area. Do you have the record there, Mr. Meiselman?

MR. MEISELMAN: Not at this moment, when I get to Dr. Ponturo, I will be sure to have it.

THE COURT: Well, are you saying he didn't know whether he had it filled?

MR. MEISELMAN: There was no bill in the record.

THE COURT: No, whether he had the prescription filled.

MR. MEISELMAN: Well, there is a prescription in evidence.

May I have it, sir, may I have the Exhibit?

MR. GILLEN: If your Honor pleases, it was on my cross, he talked about Lakes Bar Road.

MR. MEISELMAN: No, Log Filled Road.

MR. GILLEN: He said at the first pharmacy, he couldn't say which one it was, but he claimed it was filled.

THE CLERK: Number 20.

THE COURT: Well, go ahead.

MR. MEISELMAN: (Addressing jury.)

And ask yourselves this, Ladies and Gentlmen:

When he told you about this prescription, did you receive the impression that he wanted you to understand

that that prescription was for the injuries he received on June 28th; is that the impression he was creating in your mind?

Now, until we saw the prescription --

MR. MEISELMAN: May I have it, Mr. Ritchie?

MR. RITCHIE: It is there (indicating in folder).

MR. MEISELMAN: (addressing jury) And the prescription was for -- Oh, by the way, Mr. Goberman told us it was pills, the prescription is for micolard (phonetic), and the doctor testified that micolard is for the combating of an infection, and that Mr. Goberman had an infection in his groin.

What does that have to do with redness of his skin, or was he trying to pull the wool over your eyes, and that time slipped?

This man who was so frightened, went to see a lawyer and filed a mechanic's lien against this job, not months later, or years later, but filed a mechanic's lien in which he said, and it becomes important, Ladies and Gentlemen, it is in evidence, Defendant's Exhibit R, and I urge you to read it, it says quite a few things, first, it is Sworn to, it is dated September 14th, the signature of the notary is September 14th, and he says in this, among other things, that first -- I shouldn't

say first, because it is not really first, he says the material actually manufactured for, but is not delivered to the real property, and this, I urge you to consider when you come to the question of interstate commerce, and then he says the time, the first item of work was performed, the time when the first item of material was furnished was March 5, 1972, and then he said under Oath that the time when the last item of work was performed was the time when the last item of material was furnished, was July 6, 1972.

Now you all heard him say that he didn't do anything on this job after June 24th, but he Swears here that he did it up until July 6th, even though there was no material that had been manufactured that had yet been delivered, all material had been delivered to the site.

And he proceeds to start a lawsuit against Mr. McNamara and the other defendants for two and half million dollars.

(At this point Mr. Leone spoke in sotto voce to the Judge.)

THE COURT: Just a minute.

MR. LEONE: May Mr. Merolla step out of the courtroom for a moment?

I am sorry.

THE COURT: Do you mind, Mr. Meiselman?

MR. MEISELMAN: No, sir.

MR. LEONE: I tried to do it without interrupting, but I couldn't.

(At this point, Mr. Alphonse Merolla leaves the courtroom.)

MR. MEISELMAN: (addressing jury) Now, if Mr. Goberman would have you believe that Mr. Thomas McNamara, the man you see there, will beat him up for $1300, what would we do to him for two and a half million --

MR. RITCHIE: Objection to the use of the word "we," your Honor.

THE COURT: I'm sorry, I didn't follow the logic of it.

MR. MEISELMAN: Mr. Ritchie objected to me using the word "we," I apologize to the Court.

THE COURT: Please don't do it.

MR. MEISELMAN: Yes.

MR. MEISELMAN: (Addressing jury)

When I said, "we," I meant Mr. Thomas McNamara, that is the man I represent.

THE COURT: I know, but Mr. Ritchie's point is that the case is about Mr. McNamara and not by you.

MR. MEISELMAN: I stand corrected, your Honor.

MR. MEISELMAN: (Addressing jury)

Would we -- I beg your pardon -- Would a lawsuit of two and a half million dollars have been brought by a frightened man, would a letter be sent the next day demanding money by a frightened man, or is this a man who has concocted and conjected a plan where he may not have to work again for the rest of his life, because he found himself a pigeon?

First, he is going to tell about the beatings, he wants Mr. McNamara convicted, and then he wants money, two and a half million dollars worth.

What stronger motive, Ladies and Gentlemen, is there than that, money?

(At this point, Mr. Alphone Merolla re-entered the courtroom.)

MR. MEISELMAN: Now, we have Detective Gill and we have Allen Goberman, and with your permission, Ladies and Gentlemen, I would like to discuss them for a moment.

Harold Goberman first testified that he thought this was being done for LenAl, he was disabused of that later on, but he does remember that when he went to the conference on June 5th, that there was a conversation with the plumbing contractor on the telephone, and that he discussed payments and work with the plumber on the

telephone, with John McNamara also on the telephone, and that there was talk about getting the job moving, and that there was talk about kickbacks; that Harry Goberman called Thomas McNamara a liar, and that Harry Goberman threw a punch at Thomas McNamara.

Was there a scuffle, Ladies and Gentlemen?

I don't know, I wasn't there, neither were you, and, really, is that really the question? Was there a scuffle, or was there a beating? And was it tortured out of its true perspective of being what it was, a heated argument.

R3 fls

(continued on next page.)

Harold Goberman has violent propensities, throws a punch and what happens?

But now we come to Allen's testimony in which there is quite a contradiction. He first says that when they got there they went inside and then into what they called the inner room, still open to the outside room, and then he was told to leave, but that isn't what he told in a statement he made, and I now quote at page 1290.

"Question: 'We both got out of the car'" -- "'we got out of the car and went into the place downstairs. There was McNamara and his son John and several others. Then we went upstairs. I waited outside in the hall, the door was closed and Harold went inside with the others.

"Did you make that statement?

"Answer: Who did I say that to?

"Question: Well, sir, I show you Defendant's Exhibit A which is dated November 13, '73, and I ask you if that is your signature on that page.

"Answer: That is my signature.

"Question: And did you state what I have just read?

"Answer: That is right."

As a matter of fact I believe that he tried in his effort to convey to you that his brother was sitting there very quietly and nervous because everybody was shouting at him, and on cross-examination he stated in his statement, and this is page 1,292:

"Question: Did you state, and I quote, 'They were excited and all shouting at each other, basically the job was about money and the job itself he was accused of taking kickbacks and the McNamaras felt the job wasn't going the right way.'

"Did you make that statement?

"Answer: Yes.

"Question: Did you finally make the statement, 'I make the statement freely and voluntarily with no threats because it is true'?

"Answer: That is right.

"And did you sign it right there?

"Answer: I signed it.

"Question: Did you also state, 'I have given this information to the Government?

"Answer: Yes, I did, I assume I did."

Now did we hear that on his direct?

There is a difference between Mr. Harold Goberman sitting there meekly while everyone is shouting at him

and Harry Goberman sitting there and shouting back.

It wasn't one-sided.

1296: "Question: Would you say there came a time when everybody was raising their voices in that room?

"Answer: Yes.

"Question: Was your brother arguing and shouting back?

"Answer: Yes."

It is also strange that here, here was a man who believed, as he told you, that his brother was beaten and that first he remained where he was, he doesn't go into the room, and secondly, after his brother came out of the room they never discuss it. He doesn't ask Harold and Harold doesn't tell him.

The strangest part of all this is that although they first testified they went home directly after this meeting in McNamaras, or back to the now, it now comes out that Harold Goberman went to a bar to have some drinks with the people who he says had beaten him.

MR. RITCHIE: Your Honor, there was nothing in Mr. Goberman's testimony --

THE COURT: No, it was not in Mr. Harold

Goberman's testimony, I don't think, but --

MR. MEISELMAN: This is Mr. Allen Goberman's testimony, your Honor, Mr. Harold Goberman testified that he doesn't remember with whom he went, but he thinks it was with a fence contractor.

This is a man, Allen Goberman, who thinks that his brother has been beaten, beaten and yet in evidence, Exhibit AO, Allen Goberman's name was signed to it by his wife, as he testified, and a letter was written by LenAl to the two brothers, you remember them, the excavation people under date of July 6, 1972, long before perhaps Mr. Goberman thought he would be testifying on that stand in support of his brother's story:

"Among other things, Tom McNamara seems to us to be a conscientious man and I am sure he will take sure of the problems related to his building now that Harry Goberman has been thrown off the project."

That is July 6, 1972. Why was this letter written, because as late as May 8, 1972, Defendant's Exhibit S, the two brothers, the excavation people, was still billing LenAl for the work that they had done, not in January or in February but on May 3, 4 and 5.

Read it for yourselves as to who was doing this job, LenAl, Harry Goberman, HarMac? I would like to know, I think you are entitled to know, and its importance will soon be relevant.

It is also interesting that Mr. Allen Goberman testified concerning his relationship with the Merollas.

Page 1331: "Question: Did you have any business dealings with Alphonse M. Merolla at any time?

"Answer: No response.

"Question: The third man (indicating)?

"Answer: I am not exactly sure.

Question: Just answer yes or no or you don't know.

"Answer: I can't answer with a yes or no.

"Question: Did your brother have any business dealings with Alphonse M. Merolla?

"Answer: Again, I'm not sure if something can be considered as a business deal.

"Question: Did he have any dealings other than that which involved the McNamaras, to your knowledge?

"Answer: One time.

"Question: Yes or no.

"Answer: Maybe.

"Question: And did you ever have dealings with Alphonse M. Merolla about anything, other than things to do, yes or no, with the McNamaras, answer yes or no.

"Answer: Possibly."

Now, both Harold and Allen, you have heard their testimony, appeared to have had dealings with the Merollas that do not concern Thomas McNamara or his son, and perhaps that is why he goes to have a drink with him in a bar after he claims they beat him up, and those dealings have nothing to do with us.

MR. RITCHIE: I object to the use of the word "us."

MR. MEISELMAN: I beg your pardon.

(Addressing jury) With Thomas McNamara. And he never discussed it with his brother going home.

We have heard Mr. O'Sullivan's testimony about the money, we have heard his testimony that the wall was in danger of coming down, that the roof was sagging and that there was a serious drainage problem, and that Thomas McNamara's main objective was to get this job completed.

What would he gain, ladies and gentlemen, by not getting it completed?

Can you think of one reason why he wouldn't want this building completed? He had every will and every effort on his part, every need, every intention, every want, every desire to get this building completed. How would he stand to gain by not having it completed? What was his motivation for not having it completed?

Now Tom Gill is a detective, he knows Harold Goberman, he knows him to be a dangerous man, he knows that Harry told him about June 5th that there was an altercation and there was a gun and that Allen was a witness.

Detective Gill goes to see the witness, he said, "Allen, was there a gun?"

And Allen says, "No."

And then some days later he again went to see Allen and said in substance, "Allen, was there really a gun?"

And in substance Allen says, "Well, you know my brother, believe what you want," because he says, Allen, that he thought that his brother had made a statement to the police earlier that day, he didn't

know what was in the statement but if his brother put it in the statement he said to the police officer, "Believe what you want."

(Continued on next page.)

Summation-Meiselman

MP:jm
T6pm

Nowhere, nowhere in any of the testimony in any of the conversations, is there any threat or is there a conversation where mention is made of slowing down or stopping the job. Only getting it moving. That was Tom's intention.

There comes a time when he signs the contract release, leaves, changes his mind. How does one get out of it? Very simple for a man who is inventive and creative and thinks that various oaths are for different purposes, he claims duress and claims he was beaten, and that's how he signed it. How else would you get out of it if it were you? And I don't mean by that to try to place yourself in his position because that man is unique.

Both Allen and Harry testified there was a door. And they took him inside and closed the door. They forgot one thing, that there was no door and it couldn't have been closed. It is unusual and that's why they assumed, as most people would, that there was a door. This time there wasn't. Allen Gniazdowski said there was no door.

MR. RITCHIE: Objection. That wasn't his testimony.

THE COURT: His testimony -- I think the jury

must rely on its recollection on these matters. If you have a reference, would you refer to it?

MR. MEISELMAN: Page 824:

"Question: Was there an actual physical door there?

"Answer: I would say no."

Dottie Tomaselli said there was no door, James McNamara says no door. Allen Gniazdowski says he took the signatures. You saw him, was he lying?

John Tew testified that his relations with the McNamaras was good. And that's when there came a time when Mr. McNamara said to him, if anything happens to me or my family or my building, I've got a contract for Harry. Is that a threat or is that a conditional statement of a frightened man as John Tew said he was. He didn't say I am going to kill him. He didn't say I have a contract for him. He said, if anything happens to me, my family, or my building. Who says it that way unless they are frightened? Unless they think something is going to happen? And please remember, at that time Mr. McNamara had already been advised by Thomas Gill, and by Desmond O'Sullivan, and by others, of the vicious and violent propensity of Harold Goberman. About the murder.

Taibbi testified, and I will let you judge Mr. Taibbi for what he is, except I want to call your attention to the fact that here is a man who is attempting to build -- I'm sorry, attempting to be a superintendent on a job building a structure and didn't have and had never seen the specifications on the job. And he was forced to admit on cross-examination that with all the experience he had, he told you,ladies and gentlemen,about, this was the first job he had ever tried to superintendent with no specifications. If I were to ask you to build a cake ten inches high and twelve inches in diameter, wouldn't you ask yourself what color, what kind? What should I put in it? Will there be icing? If so, what kind? How about filling?

If you can't build a cake without specifications, how are you going to build this structure without it? And his testimony was further illuminating, all the time he saw Harry and Allen on the job, he saw Allen-- I'm sorry, he saw Harry only two times more than Allen. Who was building this job, was it Allen or Harry?

Then he finally testified from his notes. And the notes show that it is the last entry for the day on June 9th. The last entry in his notes, the last entry for the day that John McNamara was on the job

that afternoon and made certain threats. But I refreshe his recollection that Desmond O'Sullivan testified that on that afternoon John McNamara and Thomas McNamara and the other McNamaras were, and the detective from the Suffolk County District Attorney, and the District Attorney, were meeting that afternoon and evening in Mr. O'Sullivan's office. Could John McNamara have been two places? And that is carried out by the notes from the District Attorney and from Desmond O'Sullivan who bills for his time by hours and keeps accurate records of it. And most important of all, with respect to Mr. Taibbi, his notes show on June 20th he was notified by the Town Inspector to stop building.

Ladies and gentlemen, there has been some testimony in this case concerning interstate commerce. And his Honor will charge you with respect to interstate commerce because it will be necessary for you to make a finding with respect to it. And in attempting to prove interstate commerce, the Government brought in certain witnesses. I will not bore you by going through either their testimony or the documents that were offered. I would respectfully request that you ask for those documents and look at them carefully. Everything that had to be delivered had to be delivered.

Merton Electric testified they didn't finish before June 28th because he pulled his men off the job when the Town posted the building. And it will be up to you to determine if and how and what, if anything, was in interstate commerce because without it this case doesn't belong in this court. That is the only reason this case is in this court, because it was brought by the Government under the Hobbs Act which says, and his Honor will charge you, requires delay or obstruction or affectation of interstate commerce. This was a building on Nesconset Highway in Port Jefferson, posted by the Town which stopped the job and said: do not proceed because of fine or imprisonment or both, on June 20th. A notice of termination was sent by the owner, Thomas McNamara, on June 24th. Harry Goberman sent his letter terminating on June 29th. In the interim, the Town says no work.

Was there an affectation of interstate commerce or is that the ruse or excuse for bringing it here and forcing Thomas McNamara to be here today as an accused rather than a victim.

I submit to you, ladies and gentlemen, respectfully, that Thomas McNamara doesn't belong here. He shouldn't have been a defendant in this case. Not

when you consider that the testimony against him is testimony of a man like Harry Goberman, a man who spat in his face. And speaking of that -- the prosecution may say to you and they did say before when they opened that Thomas McNamara told Mr. McMullen that he had received threats from Harry Goberman. That was a lie because he had no witnesses. And it was part of their proof to show it was a lie because Agent McMullen got on the stand and he testified: sure, I was told about the threats, and he rattled them off. Mr. McNamara didn't have a witness. Was it Mr. McNamara's job to go out and do Mr. McMullen's job? Strange. Mr. McMullen found time to find prosecution witnesses. These men were all on the job. They were listed on the payroll. Why weren't they interviewed? You heard them this morning, or was it that Mr. McMullen if he had interviewed them may have found it necessary to throw his notes in the garbage as for instance Mr. McMullen testified that when he interviews a witness he makes what is known as a 302 and by this time all of you members of the jury know what a 302 is, you make a 302 from the original notes and the original notes are thrown away. He interviewed John Sini and he made notes with respect to John Sini.

Ladies and gentlemen, I show you Defendant's Exhibit BA which was also marked as Government's Exhibit 27. This is Agent McMullen's notes on the interview of John Sini.

MR. RITCHIE: Objection, there was no testimony that Mr. McMullen took notes.

MR. FISCHETTI: There was a stipulation.

MR. RITCHIE: There was a stipulation he wrote that phone number down.

THE COURT: The stipulation is he took down those two names and telephone numbers at the time of the interview.

MR. MEISELMAN: I will not take much more of your time, ladies and gentlemen. I just merely want to call your attention to the fact that Mr. Goberman has not reformed. And that he has no redemming features. He testified that he uses the name Masters or Masterson. Ladies and gentlemen, he testified falsely in front of you. And I call your attention to Defendant's Exhibit AH, where the Department of Consumer Affairs of the City of New York issued August 2nd,1974, and his application for that same Department --

MR. RITCHIE: Objection. That wasn't his testimony that he only used Masters and Masterson. His

testimony was he used Masters, Masterson and Goldman.

THE COURT: It hardly matters. In any event,he used the name Goberman on this occasion.

MR. MEISELMAN: April 30th, 1972, and in May, he was even ordering merchandise on this job, Defendant's Exhibit A, I believe, L1, under the name of Harry N. Gobin, Inc.

His Honor will instruct you that a man need not testify or take the stand on his own behalf and that you cannot draw any inference from that. If it is believed that it is not necessary to take the stand, the defendant doesn't take the stand. But you have had occasion to observe Thomas McNamara. Can you believe, and are you willing to convict him,as to the fiendish act that Harry Goberman tells you about? Are you going to dignify that story? Can you dignify that story? Because, ladies and gentlemen, that is your job. And that is what you are going to have to do. And it is within your hands that Thomas McNamara's fate and future rests and nobody else's. I don't envy you your responsibility. I have been with you long enough, longer than I expected. Perhaps too long. If I have, I'm sorry. If I have, in any way during this trial, by any mannerism or by word, irritated you, it was not intentional. I ask you that you do not hold it against

Thomas McNamara. And I thank you for your patience and listening and I trust that your verdict will be not guilty.

Thank you.

THE COURT: Members of the Jury, we will adjourn now until ten o'clock tomorrow morning. Please do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

(The jury left the courtroom.)

THE COURT: If I were to put in an instruction on bystanders, if you want to call them that, I will put it on Page 14, just before the last paragraph of the charge as you have it.

The language I am thinking of at the moment, and I will read it to you, and then you can look at it, is, it is not enough for the Government to show that a defendant was present during the commission of a crime even if it is also shown that he -- I say here knew, and it should be must have known -- that he must have known that a crime was being committed, it must be shown that the defendant affirmatively associated himself with the criminal venture and converted his effort with one or more others to further the object of the conspiracy.

MR. RITCHIE: May I be excused? Miss Katz will handle that.

MR. FISCHETTI: That is satisfactory.

MR. LEONE: It sounds all right. I think I heard "we agree."

MS. KATZ: Yes, you did.

THE COURT: I counted twenty-seven witnesses. I will have to ask Mr. Walsh about the number of exhibits. I got up to forty-five, but that doesn't seem right.

MR. LEONE: I stopped counting.

THE COURT: Would you guess that is about right?

MS. KATZ: There were quite a few.

THE COURT: Mr. Walsh is able to count them because he can count them from his exhibit sheet.

(A recess was taken at this time until October 22, 1974 at 10:00 a.m.)

* * * * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 73-CR-442

JOHN DE LISO, THOMAS MC NAMARA, ALPHONSE MEROLLA, and ALPHONSE M. MEROLLA, :

Defendants. :

----------X

United States Courthouse
Brooklyn, New York

October 22, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

MICHAEL PICOZZI
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorneys for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, FBI

(The jury is in the jury box.)

MS.SELTZER: May I proceed, your Honor?

THE COURT: Yes, Ms. Seltzer.

MS. SELTZER: Judge Dooling, Mr. Prosecutor, Gentlemen of the Bar, Madam Forelady, ladies and gentlemen of the jury:

This case is not a civil action. This case is not a suit for breach of contract. This is not one where we are being asked to determine comparative damages or liability between the parties in the action.

This case is a Federal felony prosecution. It is a criminal case. It is a conspiracy case. And according to the Government it is a case that involves interstate commerce.

The Government would have you believe that my client Alphonse M. Merolla conspired, that is he agreed and plotted with the other defendants named in the indictment to affect interstate commerce through extortion.

I submit to you, ladies and gentlemen, that the evidence that was brought out on that witness stand has nothing to do with the charges in this indictment.

Have you been shown beyond a reasonable doubt that there was an affectation of interstate commerce?

Have you been shown beyond a reasonable doubt

that any extortion ever existed?

Have you been shown beyond a reasonable doubt that the person named, the persons named, in that indictment ever conspired together?

That is what we are dealing with here, a conspiracy.

I submit to you that this case does not belong in this Court. It is nothing more than a civil contract action. The evidence shows that Mr. Harry Goberman who may be a thief and may be a murderer and who may be a scoundrel but by no means a stupid man has used the Government of the United States to his own advantage.

Harry Goberman has managed to convince a naive an apparently inexperienced United States Attorney that some great criminal conspiracy existed between Alphonse Merolla and the other defendants in this indictment.

Harry Goberman managed to convince an FBI agent who has a habit of interviewing only half the witnesses, those witnesses that may agree with him, that some great criminal conspiracy existed between Alphonse Merolla and the other defendants in that indictment.

I submit to you that Harry Goberman did this because he was prosecuting a civil action for well over

$2,000,000. And it was in his best interest, this action be won. For if he was to get a verdict against these defendants in this action, Harry Goberman would be well on his way to collecting that $2,000,000.

Harry Goberman is a con man. He has been a con man for the last 20 years or so. He managed to convince a Judge that he was insane and needed psychiatric attention. And therefore avoided a Court date.

He managed to convince the District Attorney's office that he was so essential a witness in a murder prosecution that the evidence shows he was granted immunity in that murder case. And now he has managed to con the Government of the United States.

He has used this Court. He has used the prosecutor's office and now trying to use you the jury to satisfy his own selfish greed and desire for money.

When you retire to the jury room you can take any of the exhibits that have been marked into evidence in with you and examine them. You can also take in with you a copy of that indictment. I ask that you take it and read it and you follow the law as Judge Dooling will give you in the charge at the close of the

summations. I ask that you ask yourselves, does the evidence that was brought out from that witness stand satisfy the charges in this indictment?

Have you been shown beyond a reasonable doubt that there was a conspiracy?

Have you been shown beyond a reasonable doubt that there was an affectation of interstate commerce?

Have you been shown beyond a reasonable doubt that any extortion ever in fact occurred?

There are four separate trials occurring here. And you will have to render a separate verdict to each defendant. But I ask you again, has there been any evidence to show you so overwhelmingly that Alphonse Merolla was ever involved in any conspiracy?

There are certain facts that are not disputed in this action. No one disputes that Harry Goberman gave Thomas McNamara a check for $1,300 and no one disputes the fact that a trailer was given over by Harry Goberman to Thomas McNamara. But these items were not given over through any form of coercion, they were given over because Thomas McNamara on June 5, 1972, had extended an advance to Harry Goberman, a huge amount of money. It was because of that Harry Goberman agreed to sign over these items. If there

had been any extortion on June 5th, do you think Harry Goberman would have gone back to work on June 6th? Do you think Mr. McNamara would have continued to advance him money? Do you think he would have allowed him to continue on the job if he had been extorting property from him?

There was one thing very interesting about the check for $1,300. You can take it into the jury room and look at it. Harry Goberman would have you believe that this $1,300 check was sent out under duress. He told you that John McNamara went out and got a check and brought it in and forced him to sign it. I ask you to do this, I ask you to compare the code numbers on this check with the code numbers on the other two checks that Mr. Goberman had filled out. There is one to Double M Construction Company for $1,500 and one to Kenneth Hooker, whoever he may be. And there is something very interesting when you examine the checks. While the $1,300 may not have Harmac written on the top, you will note that it has exactly the same code number, the code number of Harry Goberman's account written on the bottom.

John McNamara didn't dig up some check from some office at McNamara Buick. Harry Goberman used

his own check and he lied when he told you that John McNamara gave him a check to fill out.

I ask you to take the checks in with you and compare the code numbers.

Now, as to the MV-51. That was in effect a transfer of the trailer. The Government, I assume, will try to show that because this form was not filled out, that in some way indicated that that trailer truck was coerced out of Mr. Goberman. The reason is in most probability neither Harry Goberman nor the McNamaras knew the information that was needed for that form.

I also submit to you in most probability there is no legal requirement for having an MV-51 filled out. There is no evidence this was any kind of a motor vehicle at all. This was a trailer. It didn't have a truck or it didn't have any kind of equipment on it that would allow it to be used on the road. It wasn't an automobile or a truck, just a trailer.

I submit for that kind of vehicle there is no legal requirement for any forms to be filled out.

No one disputes that Harry Goberman signed the release on June 28th, 1972. And the consideration for this release is $25,000. The evidence shows that

it was in Harry Goberman's best interest to get out of that contract. He was doing an inferior job. The walls were cracking, the ceilings were sagging, and the cement was watery. One or two days earlier the Town of Brookhaven had posted that property because of the defective beams or walls.

MR. RITCHIE: Objection. There has been no testimony whatseover --

THE COURT: That's right.

MS. SELTZER: In any event, the property was posted. The evidence is that building was forced to stop because of the posting from the Town of Brookhaven.

Harry Goberman had gotten into a project way over his head. He cheated his brother Allen, an experienced and presumably reputable contractor, out of the job. You will recall Allen testified he was under the impression he had been negotiating for the McNamara deal. Itwas only sometime later when he drove by and found out in fact Harry had sneaked into the deal and convinced Mr. McNamara he had in fact been the original contractor on the Zigler Motors showroom.

He formed a new corporation, Harmac. Harry Goberman who presumably never built a building before on his own soon discovered it was not quite as easy as

he thought to build a building. He may have been able to con people, but building a building is quite another thing. He had the building inspector breathing down his neck; Mr. McNamara who had evidence of kickbacks --

MR. RITCHIE: Objection, your Honor. There never has been any evidence of kickbacks.

THE COURT: There was evidence of charges of kickbacks. There was no evidence of kickbacks in fact exacted.

MS. SELTZER: It was the best possible solution for Harry Goberman to accept the offer of $25,000 and sign the release. There was no need for anyone to coerce Harry Goberman or threaten Harry Goberman or extort anything from Harry Goberman. Harry Goberman was given a good offer and he accepted it.

Dorothy Tomaselli was there, Alex Niazdowski was there. They said there was no pushing and shoving.

MR. RITCHIE: Objection.

THE COURT: They observed nothing while they were there.

MS. SELTZER: Your Honor, I request Mr.Ritchie not constantly interrupt --

THE COURT: No, he must interrupt if there is a misstatement in fact so it may be corrected immediately.

That is only if there is a misstatement, and not interrupt for the sake of interrupting.

MS. SELTZER: Thank you.

MR. RITCHIE: Thank you, your Honor.

MS. SELTZER: There were no guns and blackjacks. Only a perfectly normal discussion between Harry Goberman and John McNamara, about a clause in a contract before Harry Goberman was to sign it and before it was notarized. Does this have the air of extortion? Somebody who is discussing a clause in a contract before he signs it and has it notarized?

I suggest one more thing about the date of June 28th. First of all, there is no evidence that Thomas McNamara was ever present in that room on June 28th. There is not one witness that has testified either for the Government or for the defense who ever saw Thomas McNamara in that room on the 28th. If he in fact had been the leader of this conspiracy as the Government would suggest, wouldn't he have been there on the 28th? But no, it was John McNamara who was present on that date. Thomas McNamara had had his attorney Timothy Shea prepare a release some three weeks prior to the 28th of June, presumably he had been negotiating for an agreement to that release for

those three weeks.

MR. RITCHIE: Objection. There has been no such testimony.

MS. SELTZER: I submit it is fair for me to make conclusions from the evidence.

THE COURT: You must make it clear to the jury that you are asking them to infer.

MS. SELTZER: I did say presumably.

THE COURT: That isn't good enough.

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MS. SELTZER: (Continuing). You may infer during this period of time that Mr. McNamara, Thomas McNamara, had that release in his possession. He was negotiating with Harry Goberman to sign that release.

I submit to you that Harry Goberman finally agreed to sign that release on June 28th because it had been a day or two prior to this time that the Town of Brookhaven had posted the property.

Harry Goberman knew that the game was up. And Harry Goberman knew it was in his best interest to get out of that contract. It was one thing to fight with Thomas McNamara over the quality of the workmanship but quite another thing to have the Government and Brookhaven complaining about the building or the structure of the building. So Harry Goberman signed the release and Harry Goberman agreed to get off the job site.

Harry Goberman did this only because it was in the best interest of Harry Goberman to do so.

During the course of my summation, I can try to anticipate as many arguments that the prosecution will make as possible. Neither me nor my co-counsel can anticipate all the arguments and we will not be getting an opportunity to rebut any arguments the Government

may make. I am asking you to do this, when you go back to the jury room to deliberate, think what we would say if we were given the opportunity to rebut the prosecution's arguments and argue with your fellow jurors and present them what you think we would argue were we given the chance.

I assume one argument Mr. Ritchie will raise is what happened to the $25,000. Harry Goberman testified that he never received $25,000 for which he signed a receipt. I submit to you that Harry Goberman lied when he told you he had never received the $25,000. And it is perfectly consistent with everything we know about Harry Goberman to assume he lied when he told you that. It is to his own advantage if he claims he never received the money to attempt to gain it again in a future civil action.

What happened to the money? We know there was $25,000 in that room. We know that James McNamara testified yesterday that he had gotten $20,000 in cash from the bank and $5,000 that was on hand at McNamara Buick. Did they bring $25,000 in cash in that room because they were expecting to threaten and beat up Harry Goberman? Is that how you go into a negotiation of the type that Mr. Ritchie would have you believe

occurred?

I submit that in all probability Harry Goberman did receive that money. It is possible and assuming now this was not an unharmonious business transaction it is possible he did not want to walk along the streets with $25,000 in cash. It is possible he asked James McNamara to put it back in the safe at McNamara Buick so that he wouldn't have to walk around with it. It is possible he applied it to well over $30,000 that had been advanced to him by Thomas McNamara. It's even possible that he hid it somewhere in the seat of his automobile and it wasn't found by the police. But the point is, is it consistent with what we know about Harry Goberman and the facts in this case to assume that he did in fact get that $25,000? And I submit to you that it is perfectly fair to assume that. This was notarized and this was a witnessed transaction. This is not the type of transaction that was accompanied by beatings and guns and blackjacks.

I also anticipate Mr. Ritchie presumably will try to make some great to do with the word Colombo about which he screamed and yelled in his opening statement --

MR. RITCHIE: Objection to the characterization.

THE COURT: I didn't quite hear it.

(Whereupon the above was read by the reporter.)

THE COURT: Please attempt not to characterize.

MS. SELTZER: I presume he won't attempt to scream and yell about it in his summation as he did in his opening.

The evidence shows Harry Goberman never told anyone at the grand jury that such a word was used at the trailer before. Harry Goberman probably brought this in because he watched a Grade B movie the night before or read a spy thriller and knew it was the type of word that would bring in some connotation with it.

I submit it is totally a figment of his imagination.

There are further allegations in the indictment which we do not dispute. That is Al Merolla was in fact present on June 28th, 1972. And possibly on June 5, 1972. Al Merolla was the brother of Angelo Merolla who was a sales manager of McNamara Buick.

If any of you have any dealings with cars and showrooms or have bought cars, you may or may not be aware of the fact that many people hang around the showrooms. It is perfectly consistent for Al Merolla to visit his brother once or twice a week as the

evidence showed. It is perfectly consistent that Al Merolla who possibly lived in a neighborhood would stop by and talk to people at McNamara's.

MR. RITCHIE: Objection. There is no basis from the testimony --

THE COURT: I don't think there was any evidence where he resided.

MS. SELTZER: It is perfectly consistent with everything that we have heard that Al Merolla would be present on some occasions at McNamara Buick. Most probably Harry Goberman had seen Al Merolla many times there before, but it was very convenient for him to add Al Merolla to the grand tale. It was convenient to Harry Goberman to add some credence to this tale because he knew that in fact Al Merolla was in and about McNamara Buick on numerous occasions.

But is in fact Al Merolla this person who was brought in by Mr. McNamara to threaten Harry Goberman? Is that consistent with what we know? Al Merolla is not a person who is unknown to either Harry or to Allen Goberman. He is not the unknown outsider, he is a person, by Harry Goberman's own testimony, that he had business dealings with, but nothing to do with Harmac during the period in this indictment. He is a

person who according to Allen Goberman very possibly went drinking with Harry after this alleged beating on June 5th. He is a person who in most probability also had business dealings with Allen Goberman.

You heard that from these witnesses themselves. If that is in fact what the truth is, how is it consistent with the theory that Alphonse Merolla was there to threaten Harry Goberman?

You recall that Allen Goberman testified he never discussed these meetings with his brother. His brother never discussed these meetings with him. There is one thing very peculiar that he said on page 1330: I recollect one of the parties names. Possibly my brother going with them and thinking, how strange, he was just beat up and now he goes across the street to drink with them. How strange. Well, it's not so strange if there was no animosity between the people. It is not so strange if Alphonse Merolla never beat up Harry Goberman. Doesn't it seem a little bit strange that Allen and Harry never discussed what supposedly occurred in that room?

I suggest to you the reason they never discussed it is because it never happened. Try to put yourself in the position of Allen Goberman who claimed he was

standing outside the room and in that room he claimed his brother was being beaten or believed so. Could you imagine you or any members of your family or anyone you know standing there and not doing anything, and when the person comes out of the room not saying anything or not asking what happened? And not asking "Are you okay?" And not having this person tell you, I just got beaten up? I submit to you ladies and gentlemen, it just doesn't make sense.

There are two observations I would like to make, first of all Port Jefferson is apparently a very small town. Things seem to occur there that don't occur here in Brooklyn or Queens. Everyone apparently knows everybody else in town. McNamara Buick is on Main Street, and they really meant Main Street.

The second observation is this, how could Harry Goberman who admittedly a business acquaintance of Alphonse Merolla and apparently sometimes drinking companion of his, how could Harry Goberman come into Court and make up a story about Alphonse Merolla? I submit to you any man who could cheat his brother out of a construction contract, participate in the planning and possibly the execution of a murder of a business acquaintance, hijack a truck with a loaded gun and

possess numerous aliases, and commit numerous perjurie do you think such a man would hesitate for one moment to come in and concoct a story like that which he told you?

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MS. SELTZER (continuing): I told you in my opening statement the evidence would show Harry Goberman to be a totally amoral individual. I suggest to you that this is in fact what has been substantiated.

Harry Goberman, who claims he was beaten about his entire body with blackjacks, thrown to the floor, stripped naked and kicked.

By the way, can you imagine that he was really stripped naked, in an office with no door, with secretaries and businessmen and office managers and workers coming in and out? Do you think he was really stripped naked, the way he tried to describe here in court?

Harry Goberman, who claims that he went immediately to a doctor. The doctor said it wasn't until 8:30 that evening that he saw him.

Harry Goberman, who says he was so severely beaten, notice the observations of redness as testified to by Dr. Punturo which he observed some nine or ten hours later could have just as easily come from taking a hot shower or some allergy or some self-abuse.

MR. RITCHIE: Objection.

THE COURT: I am sorry.

MS. SELTZER: I believe that when Mr. Meiselman

read the definition of the term into the record, your Honor, it said that such redness could be caused by heat, it could be caused by a rash. Correct me if I'm wrong.

But that's the evidence as I recall it and you, the jury, are the ultimate judges of the facts.

But I ask you, if you heard that.

I submit to you that it's possible that Harry Goberman could have inflicted that redness upon himself or whatever type of redness it was.

It wasn't even so severe as to merit the term "black-and-blue."

Harry Goberman, who says that he never commits perjury, especially here in court. But, he told you that he was given pills for pain and the injuries that he suffered by Dr. Punturo.

Those pills, what do we know about those pills? Harry Goberman was never given any prescription for pills. He was given a prescription for some ointment, for some type of infections which had nothing to do with anything that could have occurred that day.

Is this the Harry Goberman who would have you believe he would not commit perjury in this courtroom?

This is the Harry Goberman who has the audacity to come in here and commit perjury after perjury after

perjury.

This is the Harry Goberman who tells you with a straight face he has never been prosecuted for perjury and he does not anticipate being prosecuted for perjury. He's under the wing of the Government and he has no fears at all.

Unless you accept, totally accept Harry Goberman's testimony, I submit that there has been no corroboration whatsoever of anything that occurred in the room on either June 5th or on June 28th.

I submit to you that Gary Taibbi, the construction superintendent on the project, has contributed nothing to the corroboration in this matter.

One thing. Gary Taibbi told us about his notes. I think you will recall that he told us, very, very affirmatively, that his notes showed that it was the 26th of June when he came in and had the file cabinets taken out or when someone came in to take out the file cabinets.

Mr. Camarva's notes, testified yesterday, told us very, very affirmatively that it was the 27th that those file cabinets were taken out.

Whether or not is was the 26th or the 27th is of no great import, but the question is, is it possible that

Gary Taibbi made those notes up afterwards? I leave it to you to decide.

Gary Taibbi, who testified here, claims that some man came by the job site. Some man was at the trailer who claimed he was Al Merolla, who identified himself as Al Merolla.

There is one very peculiar thing about this man who identified himself as Al Merolla. Did you ever hear Mr. Ritchie say to Gary Taibbi, "And do you see that man who identified himself as Al Merolla here in court today?"

Mr. Ritchie never asked him that question, and I submit to you that the reason that he never asked him that question -- asked Gary Taibbi that question was because he knew that Gary Taibbi had never seen any of the defendants at this counsel table and that is why the testimony kept saying, "This man who identified himself as Al Merolla, this man who identified himself as Al Merolla."

Every other witness who testified, when it came about time to describe or to point out the person to whom he was referring, would be asked the question, "And do you see that person here in court today?" And the witness would turn around and point to the person whom he saw.

Gary Taibbi was never asked that.

I submit again that he was never asked that because none of these men were ever present at the job site.

I think it is apparent that for whatever reasons of his own, Gary Taibbi wished to support the testimony of Harry Goberman.

I also told you in my opening statement that I would reserve decision as to whether or not Alphonse M. Merolla would testify. He has pled not guilty and by this plea of not guilty he has put into issue every element of the crime involved. Judge Dooling will be more specific, as I said, with what these elements are.

But, unless you find that Alphonse Merolla is guilty beyond a reasonable doubt of each and every element of the crime of extortion and conspiracy, you must find him not guilty.

I have no doubt that you will accept Judge Dooling's charge, that you cannot make any inference whatsoever that his or any other of the defendants failure to testify.

I think it became clear to all of us last Friday that this trial had gone on far enough, that the Government had failed to meet its burden of proof, and

by having us make you sit through a week or two of further testimony would accomplish nothing. That is why it was counsel's decision not to have any of the defendants testify.

I submit that if you find that the testimony of Alex Gniazdowski, who notarized the release, and Dorothy Tomaselli, who witnessed it, was truthful, then I suggest that on that ground alone you must acquit these defendants.

These two witnesses were present during the signing. They saw Harry Goberman discussing the contract.

Either Dorothy Tomaselli and Alex Gniazdowski are perjurers, or Harry Goberman is a perjurer.

How do you decide who is telling the truth? You must apply your own common sense, your intuition and your personal abilities to comprehend what is right and what is lies.

You must evaluate what you know about each of these witnesses in trying to determine whether or not he has committed perjury.

Your task is to determine whether the Government has proven each and every element of the crime of conspiracy to affect interstate commerce through

extortion. And I ask you, do you have a doubt? Would you hesitate on the evidence that has been presented by the Government?

Do you have the same type of hesitancy that would cause you to hesitate in making the most important decisions of your own life? Have you been convinced to a moral certainty that the Government has --

MR. RITCHIE: Objection.

MS. SELTZER: Has met its burden of proof?

THE COURT: Yes. Do not instruct the jury. I will take care of that matter.

MS. SELTZER: We are not dealing with possibilities or probabilities. You do not find somebody guilty of a crime because you think he is possibly guilty or probably guilty. The standard is beyond a reasonable doubt.

I suggest that if you examine the record and examine your own consciences and decide what you believe really occurred on June 5th and June 28th, then you will find Alphonse M. Merolla and all the defendants in this action not guilty.

Thank you very much.

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THE COURT: Mr. Leone.

MR. LEONE: If it pleases the Court, my colleagues at the bar, Ms. Katz, Agent McMullen, Mr. Ritchie, ladies and gentlemen of the jury, as you know I represent Alphonse Merolla. My name is John Leone. I have one basic request to make of you.

I wish to emphasize to you, ladies and gentlemen, please, decide this case on the evidence before you and nothing more and nothing less. Please do not decide this case on the personalities of the lawyers or on anything else that is not in evidence in this case. I have been, myself, a prosecutor for five years.

MR. RITCHIE: Oh, objection, your Honor.

MR. LEONE: I'm about to say something nice.

MR. RITCHIE: It is still objectionable.

MR. LEONE: I will n nevertheless, say it.

MR. RITCHIE: Well, I thank you then. I object to that comment.

MR. LEONE: Mr. Ritchie's credibility is not in issue at this trial He has not been a witness at this trial. I have no reason to believe that he is anything less than an honorable attorney. His duties, however, are to prosecute the case, to

present the evidence.

So, in my humble opinion, ladies and gentlemen, you are making a mistake if when you go into that jury room and after you have been instructed by the Court as to the law of the case, you start talking about the lawyers. Mr. Ritchie said this, Mr. Leone sat there and said nothing for a long part of this trial and made a lot of faces maybe.

It is not fair to the defendants. If you want to give the defendants in this case a fair trial, base your decisions on the evidence and the documents that have been introduced in evidence. Nothing more and nothing less. I ask nothing more.

If you do that, I will be satisfied that my client received a fair trial. I'm not going to go into the credibility of Mr. Goberman. You've heard all about it. You've watched him. You are adults. You have a lifetime of experiences and there is no lawyer who can stand up here and say, I think he's a bad person or I think you should believe him.

It's not important what the lawyers say. It is important what you say because you are the judges of the facts here. You have to decide, not the lawyers, not even his Honor, Judge Dooling,

can decide who you should believe. And to what extent. That is for you to do. This you must do. When you examine the evidence against my client, Alphonse Merolla and you examine the indictment and the allegations against him, you have to decide whether the government has established his guilt to your satisfaction, beyond a reasonable doubt.

If the answer is no, they have not, then you must acquit Alphonse Merolla. You must by your verdict say, the case against Alphonse Merolla has not been proven. That is your sworn duty. Nothing more, nothing less.

Ladies and gentlemen, I will not, because it has been done, go over the testimony of the various witnesses. I can tell you this, and you need not accept what I tell you -- that Harold Goberman states that on June 28th, Alphonse Merolla beat him up.

He testifies to no conversations had between him and my client. As a matter of fact, no witness at this trial testifies that they heard my client say anything. Yet, there is a conspiracy indictment.

I suggest to you that is the evidence against Alphonse Merolla. If you have all that, that is proof beyond a reasonable doubt, to your satisfaction,

that he committed the crime of conspiracy, to commit extortion, then you convict him. Okay? If not, I say to you, you must acquit.

Thank you.

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THE COURT: Mr. Fischetti.

MR. FISCHETTI: Thank you, Judge.

Judge Dooling, my colleagues at the defense table, prosecution, Mr. McLean, Miss Katz, Mr. Ritchie, ladies and gentlemen: Good morning.

The last time I could speak to you. My name is Ronald Fischetti and I represent John DeLiso. It's the last time that I can give to you very briefly what I consider to be the cogent arguments in your consideration of the evidence so that when you go into that jury room you can determine whether there is a reasonable doubt as to the guilt of John DeLiso or there is no reasonable doubt.

Now, you heard in our openings, you heard from Judge Dooling, you'll hear from me, you've heard from every defense counsel, that an indictment is not evidence. It's merely a piece of paper. It's the way to start a lawsuit. It bring John DeLiso into court. He stands up here, he says, I am not guilty. It frames the issues and that's why we are here. Remember that. That's important.

But the title of the indictment is the United States of America v. John DeLiso. That's pretty impressive. So I ask you to remember that we

are all the United States of America. You are, I am, the Court Reporter, John DeLiso. It's a form of pleading. I submit to you that after you review the evidence and after you hear my very brief remarks, you may decide that the title of this action may well have been Goberman v. John DeLiso.

Now, you heard us talk about a presumption of innocence that exists. John DeLiso is still presumed innocent right here in this courtroom and the presumption exists with him while you are deliberating his case.

The Government's case, it turns largely on the testimony of Harold Goberman. That,I think you are all aware of now. I submit to you, if you do not believe Harold Goberman, the case is over. You must send each and every one of these defendants home. And you must judge his credibility.

Credibility, ladies and gentlemen, simply means believability. And in determining his credibility, his believability, we have rules that you may employ, one of which is this: If you determine that Harold Goberman lied to you about any material fact that he testified to, you may disregard his entire testimony.

You have that right, also, in considering his

testimony, his credibility, his believability, you have the right to consider his background and his motive for testifying.

Now, concerning his background, I'm not going to speak to you at length because co-counsel have covered it, I believe, better than I could. But we know from him that he is a convicted felon, on at least two occasions. That he used a gun to hijack a truck, that he used numerous aliases=- aliases simply mean phoney names -- to collect money, to get services. He did all these things and he admitted them to you.

They are not in dispute. I ask you just to consider that alone by itself, nothing else. Doesn't that give you a reason to hesitate before you would believe this man? And more than that, Judge Dooling summarized his testimony in that he actually planned a murder. The taking of another human's life. The man was murdered. That we know.

Now, why did he do all these things, I submit to you, the planning of the murder he said, through his testimony, to protect an investment. The aliases, phoney names, for services. Money again. Hijacking a truck? His crimes? Money. What do you think a man like that would do for two and a half million

dollars? That's a motive. And Judge Dooling is going to tell you in his charge that you may consider a person's motive for testifying.

I say to you, most respectfully, that two and a half million dollars, ladies and gentlemen, is a powerful motive to fabricate a story.

Now, you know by now that we can't speak again. This is our last opportunity. It's our last time in the box. Mr. Ritchie is going to speak next and let me join with my colleague, Mr. Leone, to say that personalities have no place in this courtroom, I believe.

I want my client's fate decided on the evidence, not on whether Mr. Ritchie is a better lawyer than I am or I'm a better lawyer than he is or he's handsomer than I am or speaks better than I do. Just on the evidence.

Now, he speaks last and I can't speak again. And I don't know what he is going to say. But I don't sell him short and I anticipate he may stand up here and he may say:"Well, Mr. Fischetti said all these bad things about Harold Goberman. I admit them. Harold Goberman is a felon. You heard me bring that out. Harold Goberman used phoney names. I'm not denying that. Harold Goberman planned a murder, sure.

5 Fischetti - Summation

"But, ladies and gentlemen, we didn't pick him, I didn't pick Harold Goberman, they picked him when they extorted from him."

I say to you, ladies and gentlemen, there is a falacy in that argument because here inthe United STates of America, my client and every one of these gentlemen are presumed innocent. Not guilty. So don't be fooled by that.

Let me tell you something else: Suppose judging DeLiso's fate turned on Harold Goberman and I called him as a witness? Forget about this case. Harold Goberman is my witness. I call him. Harold Goberman take the stand. He takes the stand.

Mr. Ritchie on his cross-examination brings out that he's a felon, that he planned a murder, that he used aliases, that he did all these things that you heard, he brings it out and he's my witness. I call him. How much time would you spend on his credibility, if I called him, if John DeLiso called him?

And I say to you, we're entitled to no less. Simply because the Government called him with all the majesty you may thing that implies we are entitled to no less in this courtroom.

Alan Goberman? He also mentioned my client. Took that witness stand, swore an oath to tell the truth. And he told you, ladies and gentlemen, that on June 5th, he was at the McNamara's and on June 5th, eh was outside the room and on June 5th he was outside the room with a man and while he was outside with this man, conversing in generalities for ten, fifteen mintues, things may have been happening inside.

He heard a commotion. He stepped in. He saw a gun. All these things happened while he's outside and that man is outside. And he testified under oath that that man wasn't involved in what's happening inside. He was outside with him. That's what he said.

And he was asked by Mr. Ritchie to identify that man. And he looked around carefully, ladies and gentlemen, at everybody in this courtroom and he said, "He's not at that table. He's not there." Direct examination.

On cross-examination, he remembered that maybe he was at the table, and further on cross-examination he remembered that he told Agent McMullen who that man was. And he said to Agent McMullen, four months after this happened, that that man was my client.

Important? No. Either he's outside the room where nothing is happening or he's inside the room with the gun. NOt important at all.

If you have any doubt about it, think of Agent McMullen's testimony. He's a trained investigator. He said that Alan Goberman told him that my client was outside the room with him. During that time if this happened, where are the other witnesses? Where is the picture of my client with Goberman? He got a picture of Spatarella and Goberman. Where are the fingerprints? Where is the scientific test? Where is anything in this case connecting John DeLiso with this case other than the testimony of the Gobermans?

Consider this, if you will, Goberman testified that on June 5th, he met with some or all of these defendants at two restaurants; Candlelight and Chuckie's Diner.

Now, the Government,at least, Agent McMullen, knew about this through Goberman's statement in October of 1972. Did you see one person come in, take this witness stand, and say, "Yes, I saw them together. They were in a booth shouting, arguing, there was a knife, there was a commotion." One person?

Where did this happen? In a desert? It

happened at two restaurants. He knew the name of the restaurant. He knew the time it happened. He knew the day it happened. Don't you think if it happened somebody would have seen it? Somebody would have come in? Anybody except the Gobermans to take that stand and say, "Yes, I saw John DeLiso with Goberman. I saw him in a restaurant. I saw him at the McNamaras. At the McNamaras, June 5th, June 28th.

Alex Gniazdowski, the white-haired gentleman, he see John DeLiso? The 5th, the 28th?

Dorothea Tomaselli, a secretary, came in. On direct examination testified as to what she saw on June 28th.

Did you hear Mr. Ritchie on her cross-examination ask Miss Tomaselli if she saw John DeLiso on June 28th? You remember Harold Goberman testifying about June 28th? Do you remember me asking him, examining him as to when he went down for the cab? Do you remember him saying that John DeLiso came downstairs and put him in the cab? Do you remember Mrs. Tomaselli saying that he came down the stairs alone? That she didn't see John DeLiso there. That she had never spoken to me before? Is she lying?

I submit to you, most respectfully, that in order to believe Harold Goberman you must, in that ju room, with reference to the June 28th meeting, call Dorothea Tomaselli a perjurer. And I say, why? Because she worked for Tom McNamara? Is that a reason why she'd take this witness stand, swear an oath to tell the truth and lie about these people being there, lie about John DeLiso being there, lie about John DeLiso taking Goberman to a cab? Would she dothat?

You saw her. You judge her. You remember how much time Mr. Ritchie spent with her on cross-examination? You remember if he shook her story? How many felonies did she admit to? How many aliases? How many murders did she plan? Judge her credibility against Goberman's. John DeLiso will abide by the result.

I'm finished now. I ask you to decide the case on the evidence. It is a very easy thing to go into that juryroom and use other standards. It is a very easy thing to say presumption of innocence, burden of proof, reasonable doubt, just fancy words for lawyers.

It is a very easy thing to say, they told us

an indictment is a piece of paper. It's not any proof.

Why are they here? Where there is smoke there is fire. You can do that. We will never know. But I ask you to abide by your oath as jurors and come out and send everybody home to their families.

MR. RITCHIE: Your Honor, may we have a recess?

THE COURT: Yes, I think this is a good time for our recess.

MR. RITCHIE: Thank you.

THE COURT: Please, members of the jury, do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

(The following occurred in the absence o f the jury.)

THE COURT: All right, gentlemen.

(Recess taken.)

(continued next page.)

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MP:GA
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(The jury is in the jury box.)

MR. RITCHIE: May it please the Court, Ms. Seltzer, Mr. Fischetti, Mr. Gillen, Mr. Meiselman, Ms. Leone, my associates, Forelady Kirk, Ladies and Gentlementof the Jury.

This is my second and last opportunity to speak to you. It is now the time for summation. The defense has preceded me. The Government has the opportunity to speak last, and the Government has the full burden of proof in this case. The Government must prove beyond a reasonable doubt each and every element in this offense.

The purpose of the summation is for each of the parties to give you their interpretation of the evidence. I will be calling evidence to your attention in this case evidence that I submit is important in this case. I will also be asking you to draw inferences from the evidence that is presented to you. I believe they are proper inferences. You may not agree, and it is up to you, the jury, to decide the facts, and to make the final determination. It is not my job in this summation to give you any idea of what the law is. The law is for the Judge, and the Judge will instruct you on the law in what is called the Charge.

I will be discussing evidence, and when I discuss

it, it will be as I recall it.

As has been said to you before, my recollection is not what governs, it is your recollection. If at any time during the course of your deliberations you have any doubt as to what the actual evidence is, it is all right here in the transcript, and you can ask to have it read back, and you can make your determinations on a fully refreshed recollection.

While I am asking you to draw inferences, and while I am interpreting the evidence, I may at times say that I believe something to be true. As Mr. Leone pointed out, and Mr. Fischetti pointed out, what I believe is immaterial in this case. You are the deciders of the facts. It is up to you to decide.

If I say, I believe, forgive me, because all I mean to say is I submit that a certain fact is so. I submit it to you for your consideration to reject or accept it as you see fit.

I said I wouldn't instruct you on the law, and I am not going to. I want to call to your attention certain of the Judge's Charge, and the only Charge I want to bring to your attention concerns Conspiracy. The Judge will instruct you on the law as to Conspiracy. He will instruct you that it need not be a formalized agree-

ment. It doesn't have to be in writing. He will inform you a Conspiracy can be inferred, inferred from the actions together of a number of people to a certain end. And it is the Government's submission that in fact the defendants on trial, and others, together, acted so as to extort from Harry Goberman certain documents.

The Judge will also instruct you on what is or what is not affectation of commerce. The Government has presented a number of witnesses with respect to the question of interstate commerce. Mr. Murphy, from General Motors testified, and a number of documents were submitted along with his testimony. A Mr. Anderson from Omaha, Nebraska, I believe the first Government witness, he testified concerning the delivery of documents, light poles, to McNamara Buick, from Omaha, Nebraska.

Mr. Little, one of the very first of the Government witnesses to testify, testified to when those light poles were installed. They were installed in July, late July of 1972.

Mr. Cifarelli testified, he testified concerning steel products that were submitted. And he submitted certain documents now in evidence.

And Mr. Brady testified. Mr. Brady testified, I believe, last Thursday. And he testified to the installa-

tion, the purchase from New Jersey, an installation of overhead doors in the McNamara job site, and he testified that those doors were not installed finally and completely until July of 1972.

The Judge will instruct you as a matter of law you may find on the evidence presented by the Government that there was an affectation of commerce. I will say no more about interstate commerce. I will go to another element of the crime, and that is the extortion.

As the Government noted in its Opening, and as defense counsel noted in their Openings and Summations, Harry Goberman is the chief Government witness. The credibility of Harry Goberman is very important. It must be very important in your considerations.

In the defense Opening, you will recall Mr. Gillen called Mr. Goberman a man of bottomless corruption. And Ms. Seltzer, in her Opening, called him "not a normal human being."

The Government, through its direct examination of Harry Goberman, and in its opening, laid out his background. His background of two felony convictions, one of which was in Federal Court, a Federal hijacking charge. Laid out by stipulation, and read to you by the Judge was his testimony in a murder trial. His testimony, in which

he admits under immunity that he had in fact conspired to murder an individual. He testified on direct, and it was brought out in the Government's opening that he was associated with racksteering, particularly one Salvatore Spatsarella.

But the question in this case is not whether you want Harry Goberman in your family, or whether you want to marry him, or whether you want your sister to marry him, or whether you will buy a used car from him, or whether you will have him build your building. The question you must consider and must decide in this case to convict is whether or not in this particular case, and in this particular case alone, Harold Goberman has told the truth.

The Government submits that in this case Mr. Harold Goberman did tell the truth. It so submits because of the corroboration that supports the testimony of Harry Goberman. That testimony, the testimony of other witnesses, was in very many cases the testimony of people who had nothing against Thomas McNamara, or against any of the other defendants in this case. We had lawyers, employees, and associates of Mr. McNamara testify in this case.

Even Allen Goberman, as Ms. Seltzer said, felt

his brother had cheated him, even Allen Goberman, as Ms. Seltzer said, was presumably a reputable man. It was on that corroboration that the Government submits that Harold Goberman has told the truth.

There was a reference in Mr. Fischetti's summation that this case could be called "Goberman against DeLiso and others." In point, and in fact, the caption of this case is The United States of America. And as Mr. Fischetti very aptly put it, the United States of America -- that is just a way of charging a man with a criminal complaint. But as Ms. Seltzer said in her summation, this is a criminal charge. This doesn't decide the liability, with respect to good and bad, or the way the contract was performed by Harry Goberman. That isn't the question in this case. The question in this case is whether or not Harold Goberman was extorted on two days, June 5th and June 28th.

Now, what is the testimony of Harold Goberman that is corroborated? The testimony basically is that there were two meetings, one on June 5th and one on June 28th. That at those meetings certain documents were executed by him. That present at those meetings were Thomas McNamara on only the first meeting, and not the second, John McNamara at both, John DeLiso at both,

Alphonse Merolla at both, Alphone M. Merolla at both, Angelo and Rocco Merolla at both. His testimony, finally, is that those documents that he did execute were executed by him under fear of force and violence that was being exerted on him, and not signed by him freely and voluntarily.

It is corroborated with respect to the question of meetings. I submit to you ladies and gentlement that there is no question on June 5, and June 28, Harry Goberman met at the McNamara Main Street site, and had a meeting with a number of individuals. Alec Gniazkowski so testified. Allen Goberman has so testified, and Dorothea Tomaselli so testified with respect to June 5th. Alec Gniazkowski and Dorothea Tomaselli have so testified with respect to June 28th.

Similarly, with the question of whether or not he executed certain documents on those dates, we have in evidence Government's Exhibit 15, which is the check dated June 5th, that Ms. Seltzer referred to in her summation.

We have in evidence as Government's Exhibit 16 and Government's Exhibit 17, the execution of the contract release, and the execution of the receipt.

As Defendant's Exhibits AM and AN, we have the

registration and the bill of sale with respect to the trailer on June 5th. We also have the testimony of Alec Gniazkowski and Dorothea Tomaselli with respect to that trailer registration.

We have the testimony of Alec Gniazkowski and Dorothea Tomaselli with respect to the contract release. We have no testimony with respect to the check. But we do have the check in evidence.

The only questions that must corroborated are the two important questions, the two that I submit are important. The two questions that decide this case, was it free and voluntary, or was it forced. And those two questions are: Who were present at the meetings, and did Harry Goberman freely and voluntarily sign over what he did in fact sign over.

Now, with respect to who was present, let's take the June 28th meeting. The meeting at which the contract release was executed. There have been three witnesses who testified concerning that meeting. Those witnesses are Alex Gniazkowski, Dorothea Tomaselli, and Harold Goberman. They all testified that Harold Goberman was present at that meeting, and John McNamara was present at that meeting, and even Dorothea Tomaselli testified that Alphonse M. Merolla, whom she knew as Al Merolla,

was present, and Angelo Merolla was present at that meeting.

The conflict in the testimony is that Harold Goberman said in addition to those individuals, also present was Rocco Merolla, John DeLiso, and Alphone Merolla, whom he knew as Fat Nicky.

Dorothea Tomaselli doesn't recall anybody else. But there was a third witness. That is Alec Gniazkowski. He testified at page 813 that also present at that meeting were other individuals. He couldn't identify them, but he knew that other individuals were present. I would submit, of course Alec Gniazkowski wouldn't recall them, because he was in and out of the office. I submit even Dorothea Tomaselli might not recall anybody else being present, because she was in and out of the office.

It's been said there is a definite conflict in this case. Dorothea Tomaselli has to be a perjurer, or Harold Goberman has to be a perjurer. I submit, Ladies and Gentlemen, that is not necessarily so. Dorothea Tomaselli could have taken that stand and testified to what she knew was the truth, and yet be incorrect because of recollection, because it was a part of her working day, and Mr. Gillen said in the opening that Dorothea Tomaselli doesn't even have a good recollection of this.

I submit, of course, they didn't have a good recollection, because it was just part of her normal working day.

Now, with respect to the June 5th meeting, there is a bigger discrepancy. We receive on the one hand testimony of Harold Goberman and Allen Goberman, saying there were seven individuals. Testimony of Alec Gniazkowski and Dorothea Tomaselli testifying as far as they can recall, the only people were Thomas McNamara, and Harold Goberman.

Harold Goberman in this case does have direct corroboration. That is his brother Allen Goberman.

Now, I have used the word corroboration a number of times in this summation already. And I am sure most, if not all, of you are familiar with the word, but I would like to explain it. Corroboration is something that makes you believe what somebody else has said.

Let's say you have a neighbor, and the neighbor tells you something, and you don't trust that neighbor, and it is kind of an incredible event, you may not accept the neighbor's word. What would happen with a close neighbor whom you trusted coming up and telling you the exact same thing? You would feel that the first neighbor was corroborated.

With respect to Allen's corroboration of Harold Goberman on June 5, there is an initial question, of course, and that initial question is, Wouldn't any brother lie for his brother? Wouldn't he back up his brother? But Allen Goberman testified, you had an opportunity to evaluate him, to chek him out. Do you recall his testimony? He identified each and every individual at the defense table as being present on June 5th. But he was kind of hazy on details.

I ask you this question, If Allen Goberman has perfected a story with Harry Goberman, would he be all exact in details? We also have the testimony concerning their relationship as Ms. Seltzer noted in her summation. Allen is probably a reputable contractor, unlike his brother Harry. And even according to Ms. Seltzer, Harry Goberman cheated Allen Goberman.

Now, do brothers normally cheat each other, or whether Harry cheated his brother or not, is relevant only as far as it reflects on Harry Goberman's credibility, and I assume in your mind it must affect his credibility somewhat detrimentally, and I think that is a correct assumption. What does it do about the credibility of Allen Goberman? I would submit to you Allen becomes more believable precisely because his brother did

cheat him.

I ask you to recall the testimony of Harry. Allen Goberman didn't want to stand up for his brother when originally asked about the June 5th incident. I would submit to you Allen Goberman would not lie for his brother.

What we do have is a contradiction between the two Goberman's on the one hand, and Dorothea Tomaselli and Alex Gniazkowski on the other hand. Allen Goberman knew his brother was being beaten. Harry Goberman was being beaten. I would submit to you Allen and Harry would have a better recollection of the incident than Dorothea Tomaselli or Alec Gniazkowski, who merely went in for the execution of a registration and left.

(continued on next page.)

GR:GA
T4R1 AM

MR. RITCHIE: (continuing) As Mr. Gillen said in his opening, Dorothea Tomaselli wouldn't have much of a recollection about something that happened just in the normal course of her working day.

The don't have to be lying. They don't have to be perjurors. They merely have to be incorrect to believe Harry Goberman. Now, in addition to the support given Harry Goberman's testimony concerning who was present on June 5th, there is some additional support.

First of all, there is the testimony of Gary Taibbi.

In one of the summations, somebody noted that Gary Taibbi has never identified -- was never asked by me to identify who Al Merolla was, who the man who identified himself as Al Merolla was.

As I said in my opening, Gary Taibbi would not be able to identify Al Merolla, but what Gary Taibbi is able to do is, he's able to testify as to what he remembers. He may not remember faces, but he does remember events. He remembers the fact that he was threatened shortly after he started the job by two men, one of whom called himself Al Merolla, and that those same two men came up to the job on June 5th and asked to speak with Harry Goberman. They wanted Harry Goberman down to settle

some problems on the job.

Harry Goberman supplies the indentities of the individuals. He's testified that the two individuals are John DeLiso and Alphone M. Merolla, Al Merolla.

All Harry Goberman has done with respect to that meeting in the trailer, or that -- the fact that there was a meeting in the trailer, is to supply the identities. That's all he had to do on June 28th.

Alec Gniazkowski said there were other individuals present. Alex Gniazkowski supplied the bodies.

All Harry Goberman has done is supply faces to those bodies.

MR. FISCHETTI: Objection, your Honor. I don't believe that's fair comment at all.

MR. LEONE: That's not fair comment.

THE COURT: Wait, now. Let me hear it repeated, if you will, please.

(Record read.)

THE COURT: I think he may so argue to the jury. His argument is plain enough, that Mr. Gniazkowski --

MR. RITCHIE: Gniazkowski.

THE COURT: Gniazkowski did say there were others in the room. I forget how many he said. Perhaps the record shows.

Mr. Goberman, on the other hand, said who they were. I think that's all that Mr. Ritchie has argued here. Is that right, Mr. Ritchie?

MR. RITCHIE: Yes, your Honor.

Alex Gniazdowski testified that there were more than one other additional individual present.

Additional support for the fact that there were other individuals besides Thomas McNamara and Harry Goberman at that June 5th meeting besides the testimony of Allen Goberman and the testimony of Gary Taibbi regarding the meeting in the trailer that very morning, there is also the testimony of Thomas Gill.

If you recall, Thomas Gill, who acknowledged he was a friend of the McNamara's, who acknowledged that he had questioned Janet McCartney and promised her to get her car back from the McNamara's if she'd supply information about Harry Goberman, this Thomas Gill testified that on that very day, June the 5th, 1972, Harry Goberman called him at the D.A.'s office, and I believe they later met, and that Harry Goberman made a complaint, and that complaint, that very day, was that there were goons, and Thomas Gill used the plural form, goons, present on the job.

MR. GILLEN: Objection, your Honor, objection.

Mr. Gill was not at that meeting. Mr. Ritchie is giving an unfair inference, that Mr. Gill supplies bodies or faces, or whatever.

THE COURT: No.

MR. GILLEN: At the meeting.

THE COURT: I think what Mr. Ritchie has said is that when Mr. Gill was interrogated here in the Court, and repeated to this jury what he recalled that Mr. Harold Goberman had said to him, Mr. Harold Goberman used the word "goons" in the plural, is that it?

MR. RITCHIE: That's correct, your Honor.

THE COURT: That would have been some time on or about the 5th of June, I think Mr. Gill said.

MR. RITCHIE: That there were goons on the job who had pushed him around, and had threatened him with a gun.

Now, I submit that the testimony throughout this case has been that as of June 5th nobody was looking to get out of the contract, not Thomas McNamara. He just wanted the building speeded up.

And Harry Goberman was not trying to get out of the contract, the testimony reveals. All he wanted were quicker payments on his requisitions.

So I submit that on June 5th, Harry Goberman had

no reason to make up a story about pushing and threatening, but Harry Goberman did not confect a story on June 5th so that on June 28th when Al Merolla is by all accounts present at the meeting, that he would somehow lay a foundation for an earlier meeting, where Al Merolla was present, and a number of other individuals.

I'd submit to you,.Ladies and Gentlemen, that Harry Goberman can be the biggest con man in the wordd, but there is no way in the world he could predict the future, and June 28 is 23 days after June 5th.

I would submit to you, Ladies and Gentlemen, that in fact Harold Goberman has told the truth, and is corroborated with respect to who was present on June 5th and June 28th.

The question that yet remains is whether or not the execution of these documents was as of a result of force and violence, or was it a free and voluntary act on the part of Harold Goberman.

During Summations, it was pointed out that Harry Goberman should have wanted to get out of the contract.

I'd like to state my recollection of the testimony with respect to the June 28 contract release.

The testimony has been that the town of Brookhaven posted the job, not one or two days before, but eight

days before.

Now, I would submit that the presence of the Merolla's alone, and of John DeLiso alone, at those meetings, lends credence to Harry Goberman's claim that he was threatened into signing these documents, that he was beaten into signing these documents, because there is no question with respect to the 28th. Alex Gniazdowksi has testified to it. Dorothea Tomaselli has testified to it. There were other individuals present. Al Merolla and Angelo Merolla.

Dorothea Tomaselli was questioned on cross-examination concerning that. Was Al Merolla employed by McNamara? No, but he was a friend -- He was a brother of Angelo Merolla's. Was Angelo -- What was Angelo Merolla's employment? He was employed at McNamara Buick-Pontiac.

She was also asked, did his job have anything to do with the construction of the building, and she testified it had nothing to do with the construction of the building, that he was a car salesman.

I'd submit that at a regular type of business meeting, you wouldn't have had these extraneous individuals, these individuals who have nothing to do with the meeting, that they were there for another purpose.

If you believe Harry Goberman, and I submit you should, that there were a large number of other individuals --

MR. LEONE: Judge, I must object to this.

THE COURT: "Large number"?

MR. LEONE: No, sir. The prosecution saying repeatedly that, "I submit that you should accept or believe Harry Goberman." It's not proper comment. He has no right to say that. That's for the jury to decide.

THE COURT: No. What he may argue to them is that on the basis of other data which he is drawing to their attention, it is his submission that they may.

MR. LEONE: That's not what he said.

MR. RITCHIE: I did say --

MR. LEONE: He said, "I submit that you should believe him." That's what I heard.

THE COURT: Yes. He says, I argue to you that you should accept as true, or believe the testimony of Goberman on the basis of what I claim are corroborative data which I have presented to you.

MR. LEONE: All right, your Honor.

THE COURT: I think the point is, Members of the Jury, that counsel in no case are free to present to the jury their opinions or beliefs, because they are quite

irrelevant, and must not be presented to you.

All they can do is -- and they have a right only to draw your attention to the evidence, and then to argue to you, and the word "submit" is part of the idea that here, I submit my argument to you, and to argue to you from the evidence that you should draw such an inference as a fact.

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(continued on next page.)

1 Summation - Ritchie

MR. RITCHIE (Cont'd): Now, I would submit to you that you should believe Harry Goberman when he states that there were, in addition to John and Thomas McNamara, five other individuals present, John DeLiso, Alphonse Merolla, whom he refers to as Fat Nicky, Rocco Merolla, Angelo Merolla and Alphonse M. Merolla, whom he refers to as Al Merolla.

I'd submit that their presence should lead you to believe that this was not a normal business transaction.

Now, I believe -- I submit that the entire course of the relationship between McNamara and Goberman lends credence to the fact that Harry Goberman did not sign over voluntarily the documents he did in fact sign over.

On cross-examination Mr. Emanuel Sfaelos was a asked if in fact he believed that McNamara and Goberman had a father-son relationship and he said yes, that's true, that's the way it started out.

On redirect he said that it started not to be so around the beginning of May, 1972. If you'll recall Harry Goberman's testijony, he also testified that things started to change in May of 1972. If you'll recall the testimony of Mr. Brady from Brady Overhead

Door Company, he testified that beginning in the early part of May, 1972, he wasn't dealing any more with just Harry Goberman; that now Mr. McNamara was dealing directly with the sub-contractors, rather than through the contractor.

I submit to you, ladies and gentlemen, that Harry Goberman could have in fact been putting up the worst building in the world. I submit to you, ladies and gentlemen, that Harry Goberman could have in fact been cheating the sub-contractors. We've had allusions to that in the testimony.

I submit to you that Harry Goberman could have been a menace to the Town of Brookhaven and that's the reason that the Town of Brookhaven posted his building, but I also submit to you, ladies and gentlemen, that there are Courts of law to deal with problems like that.

We've also had the testimony of Gary Taibbi.

Now Gary Taibbi testified that before June the 5th, two individuals came around on two occasions. One shortly after he began on May 22nd and again on June the 2nd and finally on June the 5th. And that when they came to him, they were very interested in knowing how the building was going and they told him

that the building had better be going up according to plans and when Gary Taibbi talked back to Thomas McNamara on June 2nd, later on that afternoon those same individuals as well as others came and told him that if he gave Mr. McNamara -- the old man, I think he was referred to -- if he gave the old man any more lip, they'd be after him.

I'd submit that that shows that the Merolas were acting for and in concert with Mr. Thomas McNamara in his relationship with Harry Goberman.

MR. FISCHETTI: Objection.

MR. LEONE: Objection.

MR. FISCHETTI: Never identified those gentlemen, Judge.

THE COURT: No. I think that that testimony goes a little far because it does not have the linkage. That statement on your part, because that testimony does not have anything like the linkage for which you have argued on the later June 5th appearance of two men.

MR. RITCHIE: Yes.

MR. LEONE: I would just have one more thing to say. I'm sorry to stand up and interrupt, but he keeps saying the Merollas.

4 Summation - Ritchie

I represent Alphonse Merolla.

THE COURT: Yes. They are individual men and you should not lump them.

MR. RITCHIE: Yes, your Honor.

I submit that in light of the linkage on June the 5th, that that lends credence to Harry Goberman's testimony that in fact Alphonse M. Merolla and John DeLiso at a minimum, were acting in concert with and at the behest of Thomas McNamara.

You'll recall Gary Taibbi's testimony, this individual who identified himself as Al Merolla and who in fact Gary Taibbi could not point out in this Courtroom. This individual who identifies himself as Al Merolla was referred to by Mr. Taibbi as a hood. That's how Mr. Taibbi perceived him.

If you'll recall the testimony of Mr. Taibbi, Thomas McNamara during one of the heated arguments with Harry Goberman, informed Harry Goberman that he had a contract on Harry Goberman, if anything should happen.

If you'll recall the testimony --

MR. MEISELMAN: If your Honor please, I must object at this time. "If anything should happen to my wife, my family."

5 Summation - Ritchie

MR. RITCHIE: That was not the testimony of Mr. Taibbi. We are relating the testimony of Mr. Taibbi.

Now, with respect to the testimony --

THE COURT: Just a moment. Have you got the page reference for that?

MR. RITCHIE: It would be on October 11th, your Honor. I could find it for you.

Page 877, your Honor.

The testimony of Gary Taibbi was, "I don't give a -- that this" -- this is what Thomas McNamara said on that occasion, "I don't give a -- if I have a heart attack or anything, Harry. If anything should happen to me, I've got a contract out on you, you little bastard."

No reference to family.

I would submit -- page 877 of the transcript.

Now, we've also had the testimony of Edward Tew and I'd submit that the testimony of Edward Tew corroborates the testimony of Gary Taibbi and it also corroborates the testimony of Harry Goberman, that in truth and in fact Thomas McNamara did say to him that he had a contract out on him.

If you'll recall Mr. Tew's testimony, he had done a job for Harry Gobermand and had not been paid.

He'd also done a job later for Thomas McNamara and had been paid. You could assess whether he's a friend of Harry Goberman's and whether he would lie for Harry Goberman. But Mr. Tew, at any rate, testified also that Thoms McNamara told himto tell Harry Goberman that he had a contract on him and as Mr. Meiselman has pointed out, on this particular occasion Mr. McNamara said, "If I have havea heart attack, if anything happens to me, my wife or my family, I have a contract on his head. Not his body. His head. I have $10,000 in a safe deposit box."

And there was also reference to dragging his head on the bumper of a car past the job once more.

I would submit, ladies and gentlemen, that the use of the word "contract" by Thomas McNamara indicates a relationship -- indicates an aspect of Mr. Thomas McNamara that isn't apparent from most of the testimony.

The testimony we've had is that he's a Buick dealer. The testimony is that he has had an account at the Marine Midland Tinker National Bank for many years and his wife and family had.

There has been testimony that hsi son was a U. S. attorney. I'd submit that the word "contract"

is not used by a legitimate business man normally and that it would onl be used --

MR. GILLEN: Objection.

MR. MEISELMAN: I object to that, if your Honor please.

MR. GILLEN: That, sir, I most respectfully move for the withdrawal of a juror and the declaration of a mistrial.

THE COURT: No. The motion is denied.

The argument made is one which you must evaluate yourselves, whether the point made by the defense, I assume, is that that kind of expression is one that has become somehow commonly known to us through motion pictures, cinema, paper books and hard cover books, that anyone is likely to be familiar with it, and to use it.

MR. RITCHIE: Ladies and gentlemen, I would ask you to draw this inference, that in truth and in fact a person who uses the word "contract" in dead earnest and you heard the testimony of Mr. Edward Tew concerning Mr. McNamara's appearance at the time that he uttered those wstatements, that a man in dead earnest doesn't use the word "contract" unless and in fact he has associated himself with people who perform

on contracts like that.

MR. FISCHETTI: Now I object to that, sir. I move for the withdrawal --

THE COURT: There is no evidence whatever to support any such argument.

The argument is what the Jury can infer from the use of those words by Mr. McNamara, if you accept the evidence that he used those words.

The motion is denied.

MR. LEONE: I haven't made a motion, your Honor.

I would request that your Honor allow me to make it at the end of Mr. Ritchie's speech -- summation.

MR. RITCHIE: I submit, ladies and gentlemen, that you've heard the testimony concerning Salvatore Spatarella.

I submit to you, ladies and gentlemen, that Harry Goberman has himself termed Salvatore Spatarella a racketeer.

(Continued on next page.)

MR. RITCHIE (Cont'd): I submit to you, ladies and gentlemen, that Harry Goberman would not have dragged in the name of Salvatore Spatarella unless and in fact there had been a meeting at the Candlewood Diner and at Chucky's Charcoal Broil at which Mr. Spatarella attended.

I would ask you to recall the testimony concerning what transpired at that meeting and what happened at the time that Harold Goberman was asked to leave the table.

I would ask you to draw your inferences from the evidence.

Now, directly with respect to June the 5th of 1972, I would submit that in addition to the presence of those other individuals, and in addition to Harry Goberman's testimony that he was in fact beaten, there is other evidence that the registration and the check were in fact obtained by force and violence and not by a voluntary action on the part of Mr. Goberman.

The first support for that testimony, I would submit, is the testimony of Allen Goberman.

Now, you'll recall that he was asked to leave the room only after Harry Goberman attempted to punch

Mr. McNamara but if you'll recall, Harry Goberman only attempted to punch Mr. McNamara, according to the testimony of Allen Goberman, when Mr. McNamara went to kick Harry Goberman in anger.

Mr. Allen Goberman did state that he was outside, he was outside with an individual who wasn't present in this Courtroom. He testified that on a previous occasion he had identified Mr. DeLiso as the person he was prsent outside with.

I would submit to you that if Allen Goberman were lying, he would have his story down pat. But Allen Goberman testifies that he heard the scuffles and that when he re-entered the room, he saw a gun being passed from one individual to another. The two individuals he identified were John DeLiso and Alphonse M. Merolla. And he did testify that at that time his brother was sitting, flanked by those two individuals. And he testified that he drew the conclusion that hsi brother was beaten, even though he couldn't see it, because all that he had heard and all that he observed.

I'd submit to you that that is support for Harry Goberman's claim that he was beaten, and it is support for Harry Goberman's claim that he didn't sign

that check over voluntarily. And he didn't sign that registration over voluntarily.

Now, I would ask you this question:

If the sign-overs on June 5th were voluntary, they'd be in effect a regular business deal. This would just be the money transaction and the construction trailer transaction that might normally occur in a building deal. But I would submit to you that no business men, no con-man in the world, nobody in the world engaged in a regular type of business transaction would that very night go to the police, go to Detective Thomas Gill and complain of having been beaten unless in fact it were true.

If this were a voluntary transaction, if he was signing over a repayment of $1,300 and a repayment of a construction trailer, why would three days later, on June 8, 1972, Mr. Thomas McNamara hand him a check for, I believe it was twenty-four or $2,600, in the presence of Desmond O'Sullivan? And Mr. Desmond O'Sullivan, the former attorney for Mr. Thomas McNamara, testified that that check was an advance and there was also testimony that at the time there was a document executed which stated that this was an advance and that it was for payment of the contractors and

would have been repaid.

I submit to you, ladies and gentlemen, that if this were a normal business deal, the $1,300 check from a man who had almost no resources -- and that has been the testimony throughout this case -- a man with almost no resources wouldn't pay $1,300 on June 5th and then on June 8th be given an advance for $2,600.

I submit to you, ladies and gentlemen, that if this were a regular business transaction, there would have been no check on June 5th and there would have been that check on June 8th minus $1,300.

Now, you might say, but why would Mr. McNamara ever pay him $2,600 three days after taking $1,300 from him? And that's the other side of the coin and it's the other side of the coin that must be answered. It's the other side of the coin that must be explained.

I submit to you, ladies and gentlemen, that when that $1,300 check was passed from Harry Goberman to Thomas McNamara, there were no accompanying documents saying this was in repayment of a loan or this reduced the account of Harry Goberman or anything to that effect. But on June 8th it was made quite clear by the accompanying statement signed by Harry Goberman

that this was not money being handed over to him in payment of an obligation. This was only an advance and he'd be liable for repayment. No such statement accompanying the June 5th check.

MR. GILLEN: Your Honor, objection. There was a document on the 5th, as far as the check. There was a document that says $1,600 trailer and it recited that this was --

THE COURT: No. There is what appears in exhibits.

MR. RITCHIE: A-M and A-N.

THE COURT: A-M and A-N.

MR. GILLEN: Yes.

THE COURT: A-M being the trailer registration.

MR. RITCHIE: Yes, your Honor.

THE COURT: Largely blank. And A-N being the so-called bill of sale, that very short instrument.

MR. RITCHIE: With respect to the -- what has been said to be the accompanying document to the check on June 5th, I'd just like to read that. Reads as follows:

"I, Harry Goberman, am repaying a debt of $16,600," not $1,300 -- "$1,600 without interest for one trailer that was purchased by Thomas McNamara and

put in my name for use on the McNamara Buick-Pontiac job site. By returning the trailer ownership to Mr. McNamara" -- "to Thomas McNamara."

I would submit that this Defendants' A-N has nothing whatsoever to do with the check. What it has to do with is the registration.

Now, if you'll recall, Ms. Seltzer in her summation asked you to consider these checks. Similarly I will ask you to consider these checks.

With reference to the check for $1,300 on June 5th, I would ask you to look at it. I would ask you to look at the name of the account -- of the bank. It's called the Tinker National Bank.

Mr. Harry Goberman has testified that he only opened his account in March of 1972. Mr. Koch has testified that Mr. McNamara has had accounts at that bank for many years.

I would submit that Government's 12, which Mr. Goberman introduced as the type of check he had in his possession on June the 5th and had had in his possession for several months previously, is totally different from the Tinker National Bank check.

I would submit that it isn't even the same as his original checks until he got his permanent

check book. They're quite different. Both -- Both the original checks and the checks with the imprint of HarMac Contracting Corporation are drawn not on the Tinker National Bank but on the Marine Midland Tinker National Bank.

Now, Ms. Seltzer has noted that in point of fact, the three checks all bear the same imprint of a code number or an account number and that's quite so.

Now, I would ask you to draw the inference that from the -- from the face of these checks, that this imprint of a code number can be put on a check at any time.

MR. MEISELMAN: Objection.

MR. GILLEN: Objection.

THE COURT: No evidence on that. May not ask the Jury --

MR. RITCHIE: Your Honor, there is evidence on these doucments and I would like to -- I'll make an offer of proof at side-bar, if your Honor wishes.

THE COURT: No. If you can genuinely point out to the Jury something on the face of the check itself, you may do so.

MR. RITCHIE: Yes, your Honor.

THE COURT: All right.

From the face of the check itself, Ladies and Gentlemen, I would ask you in your considerations of these checks to look at the amounts to be paid, $1300. I would then ask you to look at the bottom of the check on the right side, not the side in code number, but on the right side, and you will see that on each of these checks there is imprinted in what I would submit is the same type of writing as the code numbers, certain numbers.

On the check for $1300 --

MR. GILLEN: I would object to this. Mr. Ritchie had Mr. Cook from the bank, and he could have stated if there is any such thing. It is highly improper.

THE COURT: It is not at all. Let the man complete the argument, and if it then incorrect in any particular, that will be promptly drawn to the jury's attention.

MR. RITCHIE: If you look on the right side, there are ten characters. On the $1300 check, the first four characters are zeros. The next character is a 1, the next character is a 3, the next is a 0, and the next character is a 0. I would submit that at that point you can infer that you might put in a decimal point. The next two numbers are also zeros.

$1300, one three zero zero, zero zero.

On the March 15 check, the original check, the $1500 check, the first four characters are zeros, the

last four characters are one, five, zero, zero, and then two more zeros.

On the Regular account check you have a check for eighty-two and zero zero dollars, and the first six characters are zeros, and the last two are eight two, zero sero.

I would submit to you that from the face of the check you can infer that the imprint of a character of the account need not be placed on the face of the check at the time it is printed, it can be put on subsequently at the time that a check is being cancelled.

MR. MEISELMAN: I object to that. There is no testimony in the record as to that. Mr. Cook was here, and he could have so testified if Mr. Ritchie so desired.

THE COURT: This is an argument which the jury itself may evaluate on the face of the instrument, or, rather, of the three instruments. I think Mr. Ritchie may be arguing to you clearly enough so that you, with your own experience, can determine whether or not you are free to accept the evidence which he has -- what he claims is evidence that he has presented to you.

MR. RITCHIE: Now, Ladies and Gentlemen, I would submit that the difference in the face of the checks support Harry Goberman in his claim that the check was sup-

plied to him by John McNamara.

I submit further, Ladies and Gentlemen, that from the very packet of Defendant's AD there is further support --

THE COURT: Is that the package of thirteen or so checks?

MR. RITCHIE: Yes, your Honor.

I would show you Defendant's Exhibits from AD, check number 156. I would ask you to compare the face of Government's 15, a check signed by Harry Goberman, to Thomas McNamara, with the check from McNamara to Goberman for $102,814, and I would submit that if you look at them, you will see that they do both bear very similar facial characteristics, Tinker National Bank, Tinker National Bank, and I would submit that the entire rest of the check, with the exception of the account numbers, is the same, or almost the same.

In light of the fact that the account of Harold Goberman, according to his testimony, was not opened until March of 1972, I would submit to you that the name Tinker National Bank is very important, in light of Thomas McNamara's long-standing association with that bank.

If you infer that this check was supplied not by

Harry Goberman, not from his regular checkbook, but by the McNamara's, then I think --

MR. MEISELMAN: Your Honor --

MR. RITCHIE: --- Then I submit, I should say --

MR. MEISELMAN: -- the name McNamara was mentioned.

THE COURT: You can't pluralize them. The testimony as early referred to is not that Mr. Thomas McNamara touched that check.

MR. RITCHIE: By Mr. John McNamara, I'm sorry.

I would like to point out that the Judge will instruct you that the guilt or innocence of an individual is of an individual, whether they are charged with Conspiracy, or whatever they are charged with, and if I refer to the McNamara's, I am sorry.

If you infer that this check was supplied to Harry Goberman by John McNamara, then I submit that that was further evidence that this was not a normal business transaction, because if Harold Goberman were just waiting -- if he were just repaying a loan, or whatever he was doing, I submit to you, Ladies and Gentlemen, that he could have at least waited until he had his own check, and that he would have drawn it on his own account to keep his bank records straight.

No matter how much of a con man anybody, especially á man as concerned with money as Harry Goberman is, would want to keep his bank records straight, I would submit to you.

Now, with respect to the registration. As has been pointed out by defense counsel, only one box is filled out on the registration. I would submit that such a hurried filling would not be necessary in a normal type of business transaction; that it would only become necessary when the registration had to be signed while everybody was present, so that in fact the person who signed it would in fact sign it.

With respect to the 28th, was the execution of the contract release and the receipt voluntary, or wasn't it? As Mr. Harold Goberman claims, was it by force and violence?

Once again I would submit to you that we have the testimony of Alex Gniazdowski and Harry Goberman that there were not only John McNamara and Harold Goberman, but also Alphone Merolla, Angelo Merolla, and other individuals present. The other individuals are identified by Harry Goberman as being Alphone Merolla, whom he refers to as Fat Nicky, John DeLiso and Rocco Merolla.

I would submit to you that the fact that those five additional individuals were present supports Harry Goberman in his claim that force was employed. I submit that the testimony of Dorothea Tomaselli that in fact Desmond O'Sullivan was not present, and in fact, Timothy Shea was not present, and there has been no testimony whatsoever that Mr. Emanuel Sfaelos was present, I would submit that at the time a contract is being executed, you don't have five extraneous parties, you would, if anything, have attorneys present, and the testimony in this case is that there were no attorneys present.

At a time that a contract supposedly for $25,000 was executed, a contract release, there were no attorneys present.

If you will recall, Harold Goberman claims that initially he refused to sign an contract release until he had spoken with an attorney. Does that sound unreasonable to you? If you will recall the testimony of Emanuel Sfaelos, on June 27, he said possible on June 26, but on one of those two occasions, he received a phone call from Thomas McNamara, and Thomas McNamara on that date told him that he wanted Harry off the job, and Emanuel Sfaelos, the representative of Harry Goberman throughout the course of this contract, on legal matters,

stated to Mr. McNamara, "We'll see you in court." That's what he said in effect, "We're either going to take this thing to arbitration, or we are going to file a lis pendens in Supreme Court."

I submit to you that Harry Goberman wanted to speak to his attorney, and his attorney didn't speak with him, and if he had spoken with him, he would have told him not to sign the contract release, but to take this thing through the orderly processes of the Court.

I would submit that the lack of those individuals, those attorneys, and the presence of other individuals supports Harold Goberman in his claim of force and threats.

With respect to Emanuel Sfaelos and his testimony concerning that phone conversation, there has been some testimony that he represented Harold Goberman in a number of actions. Is that a motive to lie? I would submit No.

There also has been testimony that Emanuel Sfaelos is representing Mr. Thomas McNamara. If you were an attorney, and if you were willing to lie, which of those two individuals would you lie for?

If the execution of this contract release were voluntary, why is there Government's 17? Ms. Seltzer

said in her summation, perhaps Harold Goberman did receive the money. But if you will recall the testimony of James Pavese, he searched the car, and didn't find anything. He searched his body, didn't find anything.

We have Harry Goberman's own testimony that he didn't receive the money, but, in addition, we have the testimony of J. Timothy Shea, an attorney for the McNamara's. Mr. Shea testified that the contract release was executed, but that the reason there was no affirmative defense put in the civil suit that has been referred to so often in summations was because in truth and in fact no consideration had been paid by Mr. Harold Goberman, and I think we can infer from all the evidence in this case that the consideration to be offered would have been that $25,000, and Mr. Shea, the attorney for the McNamara's, states that it wasn't received by Harold Goberman.

MS. SELTZER: Objection, your Honor, that was not the testimony. I do not believe that Mr. Shea testified that that money was not received by --

THE COURT: No. What he said was that there was no consideration to support the contract cancellation and release. And then you will remember that there was a question as to what did the contract cancellation in-

strument say the consideration was, and it was read out to you, and as I recall it read, in consideration of one dollar and other good and valuable consideration, and I think at that time it was suggested that that was a rather conventional form of expression.

MR. RITCHIE: I submit that in fact the true consideration was $25,000. But if you are to believe Mr. Shea, attorney for the McNamara's, not even one dollar and other good and valuable consideration was paid to Harold Goberman on that contract release, yet we have the fact that that contract release was executed.

We have even had the testimony of James McNamara. James McNamara has testified that money was taken from the bank, it was never paid, and he saw it again. And that was --

MR. MEISELMAN: Objection, your Honor. He did not.

THE COURT: He did not say it had never been paid. He said he delivered it to, I believe, John, and that he saw it again later.

MR. RITCHIE: He testified that he saw it again later, and I think from that you can infer that it was never received by Harold Goberman. If he had entrusted it to any of the McNamara's, as Ms. Seltzer states in

her summation, wouldn't they still have been able to use that defense in their contract action? They could give him the $25,000, and as Mr. Shea put it, they would have a full and binding defense to the claim of Harold Goberman.

We have had testimony in this case that Harry Goberman exited on June 28th at 11:00 A.M. and got into a cab. If you will recall, Miss Tomaselli and Detective Pavese are somewhat at odds on which way the cab was heading. At any rate, both agree that Harry Goberman got in a cab. Harry Goberman testified he got in a cab. If this were a voluntary transaction, if Harry Goberman came to that building because he had planned to execute a contract release, would he have needed a cab to leave that building? Would he have left his car in the Pioneer Diner, fourteen miles away, and taken a cab? I submit not, Ladies and Gentlemen.

I submit that he was taken to the McNamara's.

There has been testimony by James Pavese as to what happened when Harry Goberman got to the Pioneer Diner. There is no way in the world it can be said that the car had broken down, because Barry Goberman got in that car and he drove off in that car.

I submit that that further supports Harry Goberman's

claim that he was beaten on June 28th, and forced to sign that contract release. If that contract release were voluntarily entered into, even if no consideration were paid, would there be any reason to hide it? I would say no.

I would submit to you, Ladies and Gentlemen, that the testimony of Timothy Shea, once again, supports Harry Goberman's claim that he was beaten into it.

Timothy Shea testified that in August or September of 1972, John McNamara came to this office, showed him the contract release, and asked him for it back, and also received back all the copies in the Shea office, the copies of legal documents prepared by Mr. Shea. Mr. Shea turned them all over, all the copies, over to John McNamara.

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MR. RITCHIE: (Continuing) I'd submit that even if the contract were no good for one or another legal reason, there would be no reason not to keep a copy in your office file

I submit that there is only one reason and that is that it was beaten out of Harry Goberman.

You also have the testimony of James Pavese and Emanuel Sfaelos that Harry Goberman was limping. He was limping when he entered the police station and he was limping when he existe the police station.

It was pointed out on cross-examination of Det. Pavese that the first time he recalled Harry Goberman limping was when Harry Goberman called his attention to it by making a statement about pain.

In Mr. Meiselman's summation yesterday he said that a con man like Harry Goberman could have concocted this whole story, he could have brought attention to the limp and feigned a limp because he decided that he didn't want to -- he didn't want that contract release, he still wanted to be on the job.

You've heard Ms. Seltzer also say that, of course, he wanted the contract release, but let's just take for a minute, Mr. Meiselman's position. He feigned it, says Mr. Meiselman. I submit to you,

ladies a-d gentlemen, that that is incredible. Would a man whose job was to build a building, no matter how much of a con man he was, he was building a building; would a man who was building a building make a free and voluntary and very serious decision to halt construction of the building and then change his mind in less than forty minutes?

That was the testimony of James Pavese, that within forty minutes after he left McNamara's Main Street office he was entering a police building. So within forty minutes he would have had to undo that free and voluntary decision to get out of a contract which Ms. Seltzer says was a good thing for him, that he would make up a story, a story that I submit had been corroborated up to that point.

I submit that is an incredible position and while Det. Pavese may not have noticed the limp -- I submit that Det. Pavese might not have noticed it, but he did notice it and Emanuel Sfaelos noticed it and Harry Goberman would even have had to have created the story by the time he got out of that jail, in that hour he was in the jail, because Emanuel Sfaelos testifies that Harry Goberman told him that he was beaten up by goons and forced to sign the

contract release.

Then, finally, to accept that position you would either have to disbelieve Dr. PUnturo or accept the position of the defense that Harry Goberman inflicted those wounds on himself, and if you recall, Dr. Punturo testified that it wasn't from a hot shower, so far as he was concerned, from his medical opinion, it was due to the traumatic action of a blunt body.

I will submit that you will have to ignore all of that testimony before you can accept the position that Harry Goberman, the expert con man, had feigned this limp.

On the basis of what Harry Goberman said, I would submit, ladies and gentlemen, that in fact Harry Goberman did have those meetings, executed those documents, that the individuals he said were present were present and that when he executed those documents he did it under force, under threat of force and violence.

Now, of course, there were a number of discrepancies pointed out in where the clothes were ripped, and I would submit, ladies and gentlemen, that as much as anybody, even a lawyer is subject to

faults in recollection, discrepancies, I would submit to you, as long as they are not to the heart of the matter reveal that this is not a concocted story, that this is in fact what happened.

Now, Mr. Meiselman, in his summation stated that Tom McNamara was a victim, that by ruse and excuse he was brought into this courtroom, that this case doesn't belong in a Federal court.

I believe it was Mr. Fischetti who said this case should actually be captioned "Goberman v. United States" --

MR. FISCHETTI: Goberman v. DeLiso.

MR. RITCHIE: Sorry, yes. Goberman v. DeLiso.

THE COURT: That's right.

MR. RITCHIE: You've heard the testimony concerning Harold Goberman's background, you've heard testimony concerning the entire events of this case. You can make your decision whether -- whether what Mr. Meiselman says is so is in fact so.

MR. MEISELMAN: That, your Honor, is not what I have said is so but what the evidence said is so.

THE COURT: Of what you argue the evidence discloses.

MR. MEISELMAN: Oh, I see.

MR. RITCHIE: I would submit to you that in this case the background of Harry Goberman in fact -- and it's hard to believe -- enhances his credibility. And I say that for this reason: It supplies the answer to the course of contact between June 5 and June 28th of the individuals sitting as defendants, and it answers what I would submit is the major question in this case, why on June 28th were there no lawyers and instead five individuals with nothing to do with the contract, from all the testimony in the case that is so?

I would ask you to look -- I would submit to you that this is what Tom McNamara's behavior was between June 5 and June 28th, on the basis of the evidence we have: From Emanuel Sfaelos and Mr. Brady I submit we have learned that there was a breakdown in the relationship. I would submit that Thomas Gill has testified and from his testimony we learn that Tom McNamara was aware of Harry Goberman's criminal background, of his rather strained relationships with the Suffolk County Police Department, of his problems with credibility with law enforcement agencies before June 5. That was the testimony of

Mr. Gill.

The testimony of Desmond O'Sullivan was that all that Thomas McNamara wanted was to get the building completed and that to do so he was willing to file a criminal complaint on a technical violation to get Harry Goberman off the job so he could take over construction.

I would submit that knowing -- having learned from Thomas Gill of Harry Goberman's criminal background, Mr. McNamara, the owner of McNamara Buick-Pontiac and of McNamara Re New Cars, Inc. --

MR. MEISELMAN: Your Honor, there is no testimony in this record as to who the owner of Mcnamara Buick is.

MR. RITCHIE: I will withdraw that. The owner of McNamara Re New Cars, Inc., there has been some testimony as to that --

THE COURT: I believe there was testimony as to that.

MR. RITCHIE: There was testimony from J. Timothy Shea.

I would submit that Thomas McNamara, the owner of McNamara Re New Cars, Inc., learning of the background and the problems of Harry Goberman wit

the Suffolk County Police Department, felt that he had nothing to fear from dealing with Harry Goberman as a hoodlum. To use the old ways of doing things, the ancient ways, no law, no recourse to courts of law, but rather force and violence.

I would submit that on June 5th he did resort to the old way of doing things, the force and the violence. Unfortunately -- well, I will withdraw that.

I would submit that when Harry Goberman went to Thomas Gill that that certainly must have surprised Mr. McNamara because just two days later Thomas McNamara -- and we have had testimony that he said Harry Goberman was threatening from April 27th -- Thomas McNamara goes to the police, not claiming threat , merely claiming -- he goes to the D.A.'s office -- merely claiming that there was a criminal fraud perpetrated on him by Harold Goberman.

I would submit that that is a counter complaint to set up a confusion of issues in relation to Harry Goberman's original complaint on June 5th. I would submit that subsequent to June 5, Thomas McNamara took steps to get rid of Harry Goberman using lawful means.

We have had testimony concerning the meeting with Desmond O'Sullivan, we have had testimony concerning the meeting with John Ehrlich. We have had testimony that Mr. Ehrlich -- it wasn't Ehrlichman, it was Ehrlich, Mr. Ehrlich stated that there were only technical violations and he wouldn't proceed on Thomas McNamara filing of a complaint.

On June 16th, Desmond O'Sullivan gets out of the -- stops representing Thomas McNamara, but Desmond O'Sullivan testified that Thomas McNamara wanted Harry Goberman off the job and he wanted to do it without civil litigation.

Now, I submit to you, ladies and gentlemen, that what he meant by that was Thomas McNamara didn't want to have to go through the courts to get Harry Goberman off the job.

Subsequent to the end of the representation by Desmond O'Sullivan, Thomas McNamara continued to attempt to get Harry Goberman off the job.

On June 24th, 1972, four days before June 28th, a letter was sent to Harry Goberman from McNamara Re New Cars, Inc., informing him that under provisions of the contract he was terminated and was no longer

on the job. Yet the testimony of Mr. Brady, Mr. Brady from the Overhead Door Company, and you remember what he said about Mr. McNamara, his relationship with Mr. McNamara, Mr. Brady testified that on June 26th he received a phone call from Thomas McNamara and Thomas McNamara wanted him to know what was owed, what had been paid, what was left to od.

I would submit that on June 26th, in talking with Mr. Brady, Mr. Thomas McNamara was furthering his plan to get Harry Goberman off the job without any civil lititgation.

However, I would submit to you, that on June 27th, that plot, that plan -- I'm sorry, I don't mean a plot, that plan to do it without civil litigation blew up, because on June 27th Thomas McNamara spoke with Emanuel Sfaelos and on June 27th, or perhaps June 26th, on that date Thomas McNamara learned that he wasn't going to be able to get Harry Goberman off the job without going through the courts.

So I would submit to you that once again the evidence of the cab becomes very important. On June 5th Harry Goberman had brought along a witness. He'd been summoned there, he went there, but when he went there he went with a witness, his brother.

On June 28th, if you recall, there was no other person accompanying Harry Goberman except for the people who took him from the diner, and his testimony regarding the people who took him from the diner was that it was the man he knows as Fat Nicky, the man he knows as Al Merolla and John DeLiso, who took him from that diner and who took him to McNamara.

I would submit that in this particular case, on this particular day in June of 1972, Harry Goberman, whatever he is, was victimized, not that he was creating a victim. He had no witnesses, and yet he signed a contract release and didn't receive any money.

I thank you for your patience. I ask you that upon consideration of all the evidence in this case you return a verdict of guilty as against each of the defendants.

Thank you.

THE COURT: We will have a short recess now, members of the jury.

Please do not discuss the case with one another or anyone not on the jury until it is given to you to decide.

11 (Jury excused.)

THE COURT: Yes.

MR. LEONE: Your Honor, I had risen at one point and was ready to make an objection, and I thought we had interrupted just a little too much.

THE COURT: I'm sorry, sir.

MR. LEONE: I had risen at one point during Mr. Ritchie's summation. I thought that perhaps we had interrupted a little too much and I didn't voice my objection at that time, but indicated that I would do so after the summation.

Your Honor, we have had a particular problem throughout this trial, which your Honor is aware of, and that is the use of the words, "Colombo. I'm with Colombo," and indications that would lead the jury, if they are not properly and very carefully instructed, that the people who are on trial here, or that there is evidence at this trial that the people, the defendants are people who are criminals or associated with racketeers.

Your Honor was careful to admit the use of the word "Colombo," and the use of "I'm connected," phrases of that sort, only to show that threats were made and to show perhaps the state of mind of the persons to whom these statements were made.

12 During Mr. Ritchie's summation, I think that it was terribly improper for him to attack, or attempt to attack Mr. McNamara as being someone who is familiar with the use of phrases that perhaps are used by the underworld, even though they have become common today, and your Honor made that expression to the jury.

I think there is a great danger that that jury is sitting there now thinking that one of the issues before them or that there is evidence at this trial that they may consider that these defendants are gangsters or racketeers or something of that sort.

I think Mr. Ritchie went a little too far in that summation, and I think that at least the Court should carefully instruct the jury that if -- that that testimony has been adduced for no other reason than to show that threats were possibly made, and the state of mind of the person receiving it, and it is not in issue before them and they are not to consider whether or not in fact these people are racketeers.

(continued next page.)

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(The following took place in the absence of the jury.)

THE COURT: Well, I think,Mr. Leone, that you exaggerated what Mr. Ritchie did and I think that the corrective action taken almost certainly ritually overcame what Mr. Ritchie possibly was trying to do, if he was.

MR. LEONE: I don't know what else he was trying to do.

THE COURT: He was quoting a word that there was testimony had been used.

MR. LEONE: He said, I submit to you.

THE COURT: I jumped all over him and laid it out so absolutely clear that I don't see how you can possibly argue that more should be done. My own judgment is if I return to the topic now, I will dilate it rather than palliate whatever harm flowed from his using Mr. McNamara's alleged use of that word in his talk with Mr. Goberman.

Now, I pointed out to the jury there was a question as to whether Mr. McNamara had ever used the word. And that we all knew the word.

MR. LEONE: You did, Judge.

THE COURT: It's all over. What more we can do, I think if I return to it now it would be like

saying I think a little salt treatment will help the open wound. I don't think that ever helps anything.

MR. FISCHETTI: I have a request. With reference to Mr. Ritchie's mentioning of Miss Tomaselli's testimony in his summation, I objected several times on other grounds, but unfortunately I couldn't find the reference in the record in time to object. My recollection of the events is Mr. Ritchie informed the jury that Miss Tomaselli said under oath she could not recall who was there on June 28th. By the time I found the record reference, she testified quite clearly that John DeLiso and Alphonse Merolla were not there either on June 5th --

THE COURT: What was the record reference?

MR. FISCHETTI: Page 1784.

THE COURT: 1784?

MR. FISCHETTI: Yes, sir. The last question on 1783. Just my cross which is just a page and a half.

Just those two pages, 1785 --

THE COURT: Just a moment. I don't understand. Something dropped on the last line of 1785. He was also in the automobile business. Do you know if Alphonse Merolla, meaning "M" Merolla was also in the automobile business. I think that was the question.

The witness answered, yes, he was at that time.

I don't quite see --

MR. FISCHETTI: Let me explain it again, maybe I'm not making myself clear. On Page 1784, I asked Miss Tomaselli --

THE COURT: I think you have to start back on 1783.

MR. FISCHETTI: All right. I asked her, in general, if she identified everyone who was in the room on June 5. She said she had.

THE COURT: You identified individuals who were in that room, not all the individuals, --

MR. FISCHETTI: Page 1784.

"Did you identify everybody you saw in that room at that time", and the answer was yes.

And I said the same thing on June 28th:

"You also identified individuals in that room, did you identify everyone that you saw on that day?

"Yes.

"On June 28th when Harry Goberman got in the cab, was he alone?

"Yes.

"Did you see anybody accompany him to the cab?

"No.

"Did you see anyone put him in the cab?

"No.

"Did you see this gentleman (indicating)?

"No."

And then Mr. Leone:

"On June 5th, did you see this man (indicating Alphonse Merolla)? Did you see him in the office on the 28th?

"No, sir."

The inference, I think, Mr. Ritchie is attempting to convey to this jury is unfair.

MR. RITCHIE: Look at Page 1775.

MR. FISCHETTI: May I finish?

THE COURT: 17 --

MR. RITCHIE: 1775.

THE COURT: The only one she puts in there is Alphonse M.

MR. RITCHIE: And Angelo. I asked were there others.

THE COURT: I will read all the testimony to the jury. But I am not commenting on it.

MR. FISCHETTI: I'm sorry. The point is, when Mr. Ritchie says that she said she did not recall, he was giving an inference to the jury --

THE COURT: I am saying if you request, I will read the testimony.

MR. FISCHETTI: Of Miss Tomaselli?

THE COURT: Yes.

MR. FISCHETTI: I request it.

MR. RITCHIE: Then I ask you also read the testimony of Alec Gniazdowski.

THE COURT: I will not.

MR. RITCHIE: I would submit to your Honor to read one particular individual's testimony --

THE COURT: You relied on it.

MR. RITCHIE: I did. And your Honor will instruct the jury, as I instructed the jury, if my recollection of the evidence differs from theirs, it's theirs that governs. If I perhaps overstated my case, she originally said no, and that I can recall. Perhaps my --

THE COURT: Then she said no, not that I saw.

MR. FISCHETTI: Then she was asked particularly to identify the individuals. She said he was not there. Not that I recall. But he was not there.

MR. RITCHIE: The jury has heard all that testimony.

THE COURT: I can't help that. If something was said to the jury which was not correct, it should be corrected.

MR. RITCHIE: Your Honor, it should be corrected.

I would submit at the time that I said it, rather than --

THE COURT: I am sorry, it must be done. What the lawyer has told you, he simply couldn't locate it that fast.

MR. RITCHIE: I believe it can be corrected with a simple instruction to the jury if their recollection differs.

THE COURT: No, sir.

MR. RITCHIE: Yes, your Honor.

THE COURT: Because you have backed the statement and you are the Government lawyer.

MR. RITCHIE: There were a number of misstatements to the evidence throughout the case.

THE COURT: You picked up with great freedom the ones you spotted and were encouraged and permitted to do so.

MR. RITCHIE: I was. I would submit that defense counsel was similarly free to interrupt me when they didn't. I believe that they should -- their mistake shouldn't be allowed to call undue attention to one particular witness' testimony. There were a number of witnesses in this case, they all testified and the jury heard them all.

THE COURT: I think we have a very sensitive

witness in Miss Tomaselli for all the reasons we are all so very familiar with. And, we simply must get on with the case.

MR. RITCHIE: Yes, your Honor.

THE COURT: I believe the jury's lunch has not yet arrived. What do you want to do, take a short recess, start on the instructions, see if the lunch arrives and then stop there?

MR. FISCHETTI: Whatever your Honor chooses.

MR. MEISELMAN: I am satisfied to do whatever your Honor chooses.

MS. SELTZER: I would like to have the charge first.

THE COURT: We will have a short recess.

(Recess taken at this time.)

(The jury is in the jury box.)

THE COURT: Members of the jury, a question arose among counsel about exactly what Mrs. Tomaselli had said about the persons whom she saw in the room on June 28, 1972. And the testimony that is involved commences on Page 1775 as she was asked, after being asked who were present.

"Question: Were there other individuals present?

"Answer: Yes.

"Question: Were there other individuals

present besides Harry Goberman, John McNamara, Angelo, and Alphonse Merolla, meaning, I believe, Alphonse M. Merolla?

"Answer: Alec and myself.

"Question: Were there other individuals present other than those? I believe you are up to six now.

"Answer: No, not that I recall.

"Question: When you say not that I recall, --

"Answer: No, not that I saw."

Then there were questions directed to what Angelo Merolla's connection with McNamara Buick-Pontiac was and that was explained.

Then she was asked whether certain others were or were not present, including Desmond O'Sullivan. And it was the testimony about calling the cab. And finally, the testimony about the taxi cab and all that, and starting at Page 1783, Mr. Fischetti, Mr. DeLiso's counsel, said:

"Question: Miss Tomaselli, my name is Ronald Fischetti and I represent John DeLiso. We haven't spoken before, have we?

"Answer: I don't believe so.

"Question: On June 5, you identified individuals who were in that room of McNamara Buick, is that correct?

"Answer: Yes.

"Question: Did you identify everybody you saw in the room at that time?

"Answer: Yes.

"Question: On June 28, you also identified individuals in that room; did you identify everyone that you saw on that day?

"Answer: Yes.

"Question: On June 28, when Harry Goberman was coming down and got into the cab, was he alone?

"Answer: Yes.

"Question: Did you see anyone accompany him to the cab?

"Answer: No.

"Question: Did you see anybody put him in the cab?

"Answer: No.

"Question: Did you see this gentleman with Harry Goberman on June 28th or June 5th (indicating)?

"Answer: No."

Then, Mr. Leone interrupted and said,

"On June 5th did you see this man (Indicating)," and the witness said, "No."

Mr. Leone asked:

"Did you see this man in that office on the

28th?" and the witness said, "No, sir."

Mr. Leone said, "No further questions."

Miss Seltzer said, "I represent Alphonse M. Merolla, do you see him frequently in McNamara's?"

And the witness said, "Yes."

Miss Seltzer said, "Did he visit his brother often?"

And the witness said, "Yes."

Miss Seltzer asked: "Can you give us any kind of estimation as to how many times you would see him at McNamara Buick?

"Answer: Gee, it was frequently. He might come in every couple of weeks when he passed by; sometimes within a period of a week I could see him more than once.

"Question: Do you have any idea for what period of time prior to June, 1972 you had been seeing Alphonse Merolla?" Meaning Alphonse M. Merolla. "The period of months or years?

"Answer: About the beginning of Angelo's employment with us."

Is that all, gentlemen?

MR. FISCHETTI: Yes, thank you.

MR. LEONE: Thank you.

MS. SELTZER: Thank you, your Honor.

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Members of the jury:

You have heard the evidence in the case and the arguments of counsel and now must receive the instructions on the law that governs the case.

You, the jurors, are the sole judges of the facts. You must, however, follow the law as given to you in these instructions and zpply it to the facts as you find them from the evidence before you. You are not free, nor am I, to substitute our private judgments as to what the law should be for what the law in fact is.

You have been sworn as jurors well and truly to try this case and to render a true verdict. You must therefore exclude from your deliverations all bias and prejudice. You must not permit yourselves to be governed by sympathy or any other considerations not founded in the evidence and these instructions on the law.

The issues of the fact to be tried are those made by the indictment and the defendants' pleas of "Not Guilty." Bear in mind that the indictment is the formal method of accusing a person of crime; it is not itself evidence that a defendant committed the crime; it is not itself evidence that a defendant

committed the crime charge, nor is the fact that the indictment was found any evidence of guilt.

The indictment is found under 1951 of Title 18 of United States Code and it charges a conspiracy to obstruct or delay or affect the movement of articles in commerce by extortion. The statute defines an extortion in the following words:

"The term "extortion" means the obtaining of of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, of fear ..."

Under the statute and in the indictment the word commerce has reference to interstate commerce, that is, between a point in one state and a point in another state. Section 1951 defines the offense with which we are here concerned in the following words:

"Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article, ... in commerce, by .... extortion ... or conspires so to do ... shall be fined ... or imprisoned ... or both."

Turning now to the indictment, copies of which will be given to you when you retire to con-

sider your verdict, the first paragraph is directed to alleging matter intended to show the nature of the interstate commerce claimed to be involved in the case. It reads in the following language:

(Read Paragraph 1)

The second paragraph identifies Mr. Goberman and HarMac. It reads in the following language:

(Read Paragraph 2)

Paragraph 3 of the indictment is what is called the charging paragraph and it is drawn in language which is very close to thelanguage of the Statute. It reads as follows:

(Read Paragraph 3 of the Indictment.)

Paragraph Fourth of the indictment finally contains the allegations describing the conspiracy which the Government charged in general terms in Paragraph 3. It reads as follows:

(Read Paragraph 4)

There are four defendants here and you must consider the case as against each defendant separately. The evidence is not identical as to the defendants and you must evaluate it as it affects each defendant separately. Your verdict need not be the same as to all defendants.

You will observe that the defendants are charged with a conspiracy to commit the offense of the statute. A conspiracy is a combination of two or more persons to accomplish through concerting their actions, some unlawful purpose, or some lawful purpose by concerted use of unlawful means.

The Government is not required to show that the persons charged to have conspired together entered inot an express or formal agrrement or that they directly by spoken or written words agreed among tehmselves on what their object or purpose was and agreed on the details of how they would go about accomplishing it.

But the Government must show beyond a reasonable doubt in order to prove a conspiracy that two or more of the persons charged as co-conspirators in some way or manner, whether by tacit arrangement or outspoken exchanges, came to a mutual understanding that they would, by acting together, accomplish an unlawful purpose or together join in using unlawful means to gain a lawful end.

The conspiracy proved must be substantially that described in the indictment. The Government does not, however, have to prove that each and every person named as a defendant or co-conspirator in fact

participated in the formation and carrying out of the conspiracy so long as it does satisfy you beyond a reasonable doubt that two or more of the defendants on trial or any one of the defendants on trial and another person charged as a co-conspirator did form substantially the conspiracy described in the indictment and put it into execution.

So far as concerns each defendant separately considered, the Government must prove as against him individually that there was a conspiracy and also that the particular defendant whose case you are considering joined in and became a member of the conspiracy.

That the Government must prove beyond a reasonable doubt by competent evidence offered against that defendant through witnesses who heard him speak and saw him act and who testify before you to acts and words of that defendant which satisfy you that he did in fact become a member of the conspiracy.

Once the Government has shown beyond a reasonable doubt that a conspiracy was formed and the defendant whose case you are considering joined in it, then he is responsible not only for his own words and acts spoken and performed in carrying out the conspiracy but for the acts and words of his co-

conspirators performed and spoken in carrying out the conspiracy.

The essential elements of the charge of the indictment all of which the Government must prove beyond a reasonable doubt or else you must acquit the defendant whose case you are considering are the following:

First, that physical violence and threats of physical injury were used to induce Harold Goberman to do one or more of the following things, that is, to sign and deliver the $1,300.00 check, ot sign and deliver the bill of sale of the trailer, or to sign and deliver the cancellation of the construction contract;

Second, that two or more of the defendants named in the indictment conspired so to use violence or threats of injury to obtain the check or bill of sale or contract cancellation or any two or all three of these instruments from Goberman for the purpose of preventing Goberman and HarMac Contracting Corporation from continuing with the construction of the building for McNamara Buick;

Third, that the effect of the use of the acts of the conspirators directed against Goberman would

in some degree or manner delay, obstruct or affect in some way interstate commerce or other movement of any articles in interstate commerce; and

Fourth, that the defendant whose case you are considering joined the conspiracy knowing its terms and its purpose and that it contemplated the use of physical violence and threats or physical injury in order to induce Harold Goberman to act as the conspirators directed.

If the Government proves all four essential elements of the charge against the defendant whose case you are considering, beyond a reasonable doubt, rhen you will find that defendant guilty.

If, however, the Government fails to prove any one or more or all four essential elements beyond a reasonable doubt as against the defendant whose case you are considering, then you must acquit that defendant.

In this case the charge is conspiracy and conspiracy ordinarily does not necessarily involve evidence that the alleged conspirators actually went on and did the things that they conspired to do. That is because conspiracy is itself a complete crime even if for some reason it fails to be carried out. I do not understand, however, that in this case the

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Government contends that it has introduced evidence which would prove conspiracy apart from the evidence of the threats and acts of violence against Harold Goberman and the evidence of the matters connected with and related to the evidence of threats and violence.

Accordingly, the first essential element requires you to determine from all the evidence whether you find that the Government has shown that physical violence and threats of physical injury were used to induce Harold Govermen to sign and deliver the $1,300.00 check on June 5, 1972, or the trailer bill of sale on that day or to sign and deliver the contract cancellation or release on June 28, 1972.

Note particularly that the Government need not prove both episodes. It is enough if it proves beyond a reasonable doubt that on either one of the two occasions physical violence or a threat of injury was used to get on the one occasion either the check or the bill of sale and on the other the contract cancellation.

If you conclude that the Government has failed to prove beyond a reasonable doubt that physical violence or a threat of physical injury was used to

get the check of bill or sale or contract cancellation, then you must acquit all the defendants.

If you find that the Government has proved this first essential element beyond a reasonable doubt, then you go on to the second element.

The second essential element requires proof that a conspiracy of two or more persons involving at least one defendant was formed to get the checks or bill of sale or contract cancellation from Goberman by violence or threats of injury for the purpose of preventing him and HarMac from continuing with the building construction on Nesconset Highway.

You must, looking at all the evidence, decide whether such a conspiracy was formed. It is not contended that the Government has shown you any formal agreement to do the things alleged, and it need not do so. But it must prove facts and circumstances from which you are able to and do infer beyond a reasonable doubt that defendants, or at least one defendant and another person named as a co-conspirator were concerting their activities to extort from Harold Goberman the check or bill of sale or contract release by using physical violence on him or threats of injury, with the purpose of

preventing him and his company from continuing on the McNamara Buick job. In deciding whether the second element has been proved you consider all the evidence of the acts performed by each defendant, the words they used, and the occasions, if any, on which you find that they were present together and acted as a group.

If you conclude that the Government has failed to prove such a conspiracy beyond a reasonable doubt, then you must acquit all the defendants. If you find that the Government has proved a conspiracy, then you turn to the third element.

The statute requires proof of a delay, obstruction or some affectation of interstate commerce or of the movement of articles in interstate commerce as a result that would naturally flow from the acts charged.

It is not necessary for the Government to show that the defendants or any of them thought about interstate commerce or the shipment of automotive parts or building materials from outside New York to Nesconset Highway or deliberately planned to delay, obstruct or affect it.

But if the very nature of the acts charged

would in any manner or degree delay, obstruct or affect commerce, and you find that the persons, if any, whom you find to have conspired did conspire to commit the acts that would have that affect, then the third element is proved.

So here, if you find that the first and second essential elements have been proved beyond a reasonable doubt, and if you further find that (a) automobile parts were regularly being shipped from outside New York to McNamara Buick-Pontiac in Port Jefferson and were to be shipped to the Nesconset Highway site as soon as the new building was completed, or (b) if you find that building materials from outside New York were ordered specifically for the Nesconset Highway job and had been shipped to the job site for erection as part of the building, and all had been delivered to the job but had not been completely erected on the job site by June 28, then as a matter of law you may find that the Government has established the third essential element beyond a reasonable doubt. That is because any interference with the performance of a building contract involving the use of materials ordered and shipped from out of the state specifically for that building and with

the identity of the person or company who would complete the contract performance might be found by you in fact in some way or degree to affect the completion of the building and the time of the shift of deliveries of automotive parts in commerce from Port Jefferson to Nesconset Highway.

If you find that the Government has failed to prove the third essential element beyond a reasonable doubt, then you must acquit the defendants

The fourth essential element requires you to determine separately as to each defendant whether that defendant was a willing participant in the conspiracy, whether, knowing its purpose and terms th it contemplated the use of physical violence and threats of physical injury to Harold Goberman, he took an active part in the conspiracy.

To determine this question you must review as to each defendant the testimony of those witnesses who gave evidence of that defendant's words and acts as he heard and observed the, and the exhibits, if ary, that affect that defendant, and, reviewing that material against all the background of all the other evidence, you must then decide whether that defendant has been shown beyond a reasonable doubt to have been a member of the conspiracy.

If so, you will find the defendant guilty, if not, you must acquit the defendant.

(Insert before last paragraph)

It is not enough for the Government to show that a defendant was present during the commission of a crime, even if it is also shown that he must have known that a crime was being committed. It must be shown the defendant affirmatively associated himself with the criminal venture and concerted his efforts with one or more others to further the objective of the conspiracy.

There has been evidence presented to indicate that Harold Goberman was himself a person who had used violence, threats of violence and dangerous weapons in the past, and that he may have made such threats against Thomas McNamara, and there has been evidence that in the performance of the construction contract the defendants McNamara believed that they could show that Goberman and HarMac had not paid their subsonctractors bug had falsely certified that they had paid them and on that basis received substantial progress payments on the job requisitions, and there has been evidence that Thomas McNamara believed that the work was not carried out in

accordance with the plans and specifications and the requirements of the Town Building Code.

These are not matters which would afford the defendants or any of them an excuse or defense for violating the law as set forth in Section 1951 if you were to find that these matters were as the defendants say, of, if you conclude that the Government has failed to show that the defendants' assertions were false assertions as to the facts or as to the defendants' belief.

It may be that Harold Goverman and HarMac had very seriously breached the contract with McNamara Re New CArs, Inc.; departed from the plans and failed to meet code requirements, and, that, in consequence, McNamara Re New Cars, Inc., had the right to terminate the contract, to declare it at an end, sue Goberman and HarMac for damages and complete the building by other means.

But that would not legitimatize the use of physical violence or threats of physical injury in order to get from Harold Goberman the $1,300.00 check, or the bill of sale or the signed contract cancellation; to put it another way, would not legitimatize defendants in attempting by force to coerce Harold Goverman and

HarMac into surrendering their right to contest and defend themselves against those charges and to retain their money, property and contract rights until the rights of the parties were adjusted by private, uncoerced agreement between them or by civil litigation.

Similarly, if Harold Goverman did resort to violence, he may have exposed himself to prosecution, but that does not excuse the defendants from their duty to comply with the laws, including Section 1951. However, if you were to conclude from the evidence that there were only repeated heated arguments, and threats that were unreal, or were to conclude that, if there was any violence, it arose of violent contract disputes and was not connected with and used to induce the signing and delivery of the check or bill of sale or contract cancellation, that would not amount to the extortion of violence with which Section 1951 deals.

To repeat, what is charged and what must be shown is that physical violence and threats of physical injury were used to induce Harold Goberman to sign and deliver the check or bill of sale or contract cancellation and if you are satisfied that

the Government has proved that, itis immaterial that Goberman may himself be a violent man and at certain times may have uttered threats of violence against Thomas McNamara.

And an attempt to suppress evidence made by a defendant after a crime has been committed is not, of course, sufficient to establish that defendant's guilt.

If, however, you conclude here that a defendant made a conscious effort to suppress a document that he thought might be used against him, you may consider the evidence of any such attempt, along with the other evidence in the case in determining the issue of his guilt or innocence. Whether or not an attempt at suppression ofevidence shows a consciousness of guilt and the significance to be attached to any such attempt, are matters for you to determine.

When a defendant knows that a matter is the subject of a criminal investigation and voluntarily and intentionally offers an explanation intended and tending to show his innocence of wrongdoing or to disassociate himself from a suspected wrongdoer, and the explanation or statement is shown to you to be

false, you may consider whether the offering of such a false statement is a circumstance indicating consciousness of guilt.

Ordinarily, it is reasonable to infer that an innocent person would not think it necessary to invent or fabricate an explanation or make a statement tending to establish his innocence that was untrue.

Whether or not the evidence does demonstrate the making of a consciously false statement is for you to say and whether the fact or the making of such a statement if you find that it was made and was false points to a consciousness of guilt and the significance to be attached to such evidence are matters exclusively within your province to determine.

Proof beyond a reasonable doubt is not proof to an absolute certainty. Few things in life can be so proved. Proof beyond a reasonable doubt is such proof as you would be willing to rely and act upon in the most important of your own affairs.

If, after carefully weighing all the evidence you have an abiding conviction of the truth of the charge such that you feel conscientiously bound to act upon it, then you would be free from reasonable doubt.

If, however, after weighing all the evidence, you have such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves, such a doubt would be a reasonable doubt.

That does not mean that each bit of the Government's evidence must be found by you to be true beyond a reasonable doubt. It means rather that in sum total the Government's evidence must satisfy you beyond a reasonable doubt as to each element of the crime charged, or you must acquit.

A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence. Since the burden of proof is always on the Government a defendant has the right to rely on the failure of the Government to prove any essential element of the charge.

A defendant may rely too on evidence brought out on his cross-examination of witnesses called by the Government. The law does not impose on a defendant the burden or duty of producing any evidence.

Under our law a defendant has a constitutional right to remain silent. No inference unfavorable to

the defendant can be drawn from that fact. Your deliberations accordingly must exclude consideration of or reference to the matter and must concern itself solely with the evidence before you.

A defendant is presumed to be innocent and that presumption accompanies him/her throughout the trial. It continues unless you are satisfied on all the evidence that the Government has proved defendant's guilt beyond a reasonable doubt.

I will not summarize the evidence. It has not been complex and the issues of fact are plain. You have heard twenty-seven witnesses, to name them in the order in which they testified; Richard Anderson, Frank Cifarelli, George Little, Harold Goberman, Alex Guiazdowski, Gary F. Taibbi, Edward Tew, John G. Ehrlich, Biaggio Punturo, Desmond O'Sullivan, Allen Goberman, Richard M. McMullen, Emanuel G. Sfaelos, Warren M. Brady, Jeremiah Murphy, Thomas Patrick Gill, John Timothy Shea, John Sini, Sandra Di Nuzio, Majes V. Pavese, George W. Koch, Dorothea H. Tomaselli, Andrew S. Camarda, James McNamara, Kenneth Brown, James Freda and Eugene W. Brosi. Sixty exhibits have been received.

I have emphasized that you must decide the

case on the evidence.

The evidence is the testimony of these witnesses, the exhibits received in evidence, and the facts that have been stipulated.

Statements and arguments of counsel, and answers stricken from the record are not evidence.

The evidence includes, of course, what is brought out on cross-examination as well as what is testified under direct examination.

Your verdict must be based on the evidence. But in your consideration of the evidence you are not limited to the bare words of the witnesses and the bald facts that youfind have been proved. The evidence includes the inferences reasonably to be drawn from the testimony which you hear and the facts which you find have been proved.

There are two types of evidence from which you may lawfully find that a fact has been proven. One is direct evidence, such as the testimony of an eye witness to his observations of the facts to be proved. The other is circumstantial evidence, the proof of facts and circumstances which rationally imply the existence or non-existence of some other fact because such other fact usually and reasonably

follows according to the common experience of mankind. Thus, if you see people coming into a building shaking out dripping umbrellas, and others, about to go out-of-doors, turning back toward their offices, you infer from these circumstances that it is raining outside.

Or, while you can see from your window that the sky is full of clouds and the streets are wet, and you see also that passing cars are not using their windshield wipers and passersby are carrying their umbrellas folded under their arms; you infer from those circumstances that it is not raining.

As a general rule the law makes no distinction between direct and circumstantial evidence. If the evidence, as here, is in part indirect and circumstantial, then you apply to it, along with all the other evidence, the same standard of proof; it must, taken with the other evidence, satisfy you of the defendant's guilt, beyond a reasonable doubt, or else you must acquit.

You are the sole judges of the credibility of the witnesses. The motives and state of mind of each witness as they appear to you and thecircumstances and inducements under which the witness tesfitied

are to be taken into account. Consider any relation each witness may bear to either side of the case and the manner in which the verdict might affect him.

You may consider the appearance and manner of each witness on the witness stand, the witness' apparent candor or lack of it, and the character of the testimony given, whether the testimony contains inconsistencies or discrepancies, whether it is intrinsically credible or seems to you in whole or part improbable, and whether it conflicts with other testimony or is consistent with other testimony in the case.

In weighing the effect of conflict or discrepancy consider whether it pertains to a matter of importance or to unimportant details and whether it seems to you to result from innocent error or from falsehood. If you find a witness has been mistaken or untruthful, in all or in part of the testimony given, then you may give the testimony of that witness such credit, if any, as you think it deserves in the light of the nature of and the extent of the defects that you find in it.

Evidence that at an earlier time a witness made a statement inconsistent with or contradictory of that witness's testimony here in your presence justifies

you in rejecting the testimony given before you on that point but does not require you to reject the testimony.

You must decide in the light of the inconsistency and all the other factors bearing on the credibility of the testimony whether you do or do not accept it as true. You do not, however, take the earlier statement as establishing the true facts; rather, you treat it as at most nullifying the testimony given in court here.

If you conclude that a witness has knowingly testified falsely concerning any material matter, you have the right to distrust that witness' testimony in other particulars. You may reject all the witness' testimony or give it or parts of it the credence you think it deserves.

In considering the credibility of a witness you may take into account the fact that he has been previously convicted of a crime or crimes. You may also take into account evidence that a witness has admitted the commission of other acts that were in violation of the law.

I have sought not to comment on the evidence or to give any impression as to my own view, if I have one, of the relative weight of the evidence.

If I have done so, however, you may disregard it entirely for you are the sole judges of the facts.

From time to time in the course of the trial objections have been made and rulings on evidence given. Draw no inferences from the comparative frequency of objections of one or theother side or from the comparative record in having objections

sustained, disregard the question and draw no inferences from its wording about the answer that might have been given.

Where an objection is overruled, evidence then received has no special weight just because unsuccessfully objected to.

Your verdict must be unanimous.

It is your duty as jurors to conslut with one another and to deliberate with a view to reaching agreement if you can do so without doing violence to individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. Your

task is one of conscience, and pride of opinion has no place in matters of conscience. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The form of your verdict, which must be given separately for each defendant, is simple. Your verdict must be either Guilty or Not Guilty, it must be given separately as to each defendant, and it must be unanimous as to each defendant.

Your verdict need not be the same as to all defendants.

Your verdict as to each defendant will be delivered orally here in open court by your foreman in response to questions which the Deputy Clerk of Court will address to him.

You are not partisans -- you are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

When you have reached a verdict and are ready to report, simply advise the Marshal that you have reached a verdict without disclosing orally or in writing what your verdict is.

Your verdict must not be disclosed to anyone before you deliver it orally in the Court Room in response to the questions of the Clerk of the Court.

If you wish to communicate with the Court, do os in wirting, using the Foreman, Juror No. i, as your intermediary and representative. Notify the Marshal when you have any such communication.

There will now be a short recess during which counsel will review the charge with me to make certain that nothing has been omitted or misspoken. Then you will retire to the jury room to deliberate your verdict.

(Cont'd on next page.)

ar:tr
T6/R3

I would ask you not to initiate your discussions yet because you have the three alternates with you. As soon as the case is given to you and the alternates have been excused you will begin your deliberations.

When the alternates come out, please bring your coats and your lunch with you.

(The jury left the court room.)

THE COURT: Yes, gentlemen?

MR. GILLEN: I would except to so much of your Honor's charge that we excepted to yesterday.

THE COURT: You mean renew as exceptions to the charge those exceptions and exceptions which we had under discussion yesterday, in particular the ones relating specifically to the charge on interstate commerce?

MR. MIESELMAN: Yes. And the Town Board matter.

THE COURT: Yes. The matter I didn't mention at all.

MR. GILLEN: No further requests.

MR. LEONE: Nothing further.

MR. FISCHETTI: We all join in those exceptions.

MR. RITCHIE: I have nothing.

THE COURT: The next thing we do is get the

jury out and then turn them over to the marshal?

MR. RITCHIE: Can I be excused? Ms. Katz will take over for the Government.

(The jury is in the jury box.)

THE COURT: There will be no additional charge, members of the jury. We will now swear the marshal to take you into custody and you 12 will be in the custody of the marshal probably for the first time in your lives until you arrive at a verdict.

(Marshal sworn by the Clerk of the Court.)

THE COURT: Members of the jury, you will now embark on your deliberations. I should say to you in spite of what you heard in the marshal's oath the practice in this court is along about 5:30 or thereabouts if you have not arrived at a verdict you will be instructed and permitted to go to your own homes and your beds.

You will not be locked up in the St. George or anything of that sort as a means of getting a verdict out of you.

We think it better to allow you to go home than have the coersion of an unwillingness to stay late or in a strange hotel.

Will the alternates stay in the court room? The jury may step out.

(The jury left the court room.)

THE COURT: The three alternates, I thank you for your patience and attentiveness. The only gratification you've got, you don't have to decide the case. If of course, you are interested in the outcome you can always phone the clerk's office and learn what happened.

Thank you very much. You just have to check out. If you need a certificate of attendance for your employer let the jury people know downstairs.

Thank you.

(Alternates excused.)

THE COURT: Gentlemen, if it becomes desirable to have additional marshals or substitute marshals, is it allright if Mr. Walsh swears them without reconvening us all?

MR. LEONE: Yes.

MR. MEISELMAN: So that Mr. Ritchie doesn't say anything, I represent the United States Marshals in the Eastern and Southern Districts in present litigation and perhaps I shouldn't be anywhere near them.

THE COURT: Our practice is if the jury have messages to send to family, etc., it is usually

passed out and the marshal shows them to me. If they seem not to be in code and perfectly innocent then the marshal makes the phone call.

The juror of course, does not himself or herself make the call. Is that satisfactory?

MR. LEONE: Yes.

MR. RITCHIE: Yes.

THE COURT: Would you lay out all the exhibits now in case the jury asks for one or all?

What do you prefer, to send them in --

MR. LEONE: Wait until they ask.

THE COURT: If any problem arises about it, I will call you in.

If it just seems to be a straight forward request readily identifying the exhibits which are in evidence, not just for identification, is it satisfactory to you if Mr. Walsh delivers them without making a Federal case out of them?

MR. FISCHETTI: WE only ask we be allowed to look at the note.

THE COURT: Yes.

The next time we do come in you mean.

MR. LEONE: Are we free?

MR. MIESELMAN: I have the exhibits in an

folder.

THE COURT: I think that the jury undoubtedly has to eat that stuff so this is probably a good time to get a bite to eat.

MR. LEONE: Thank you.

(A recess was taken at this time.)

(Time Noted: 2:25 p.m.)

(Cont'd on next page.)

LeG:jm
lpmR1

AFTERNOON SESSION

(Whereupon, at 3:50 the Court resumed the bench.)

THE COURT: I have a note from the jury. First, get all the exhibits that had been received. I think they ought to enjoy the bill of lading (smile).

Then, a copy of the Judge's charge.

THE CLERK: Marked as Court Exhibit number 1.

THE COURT: What are your wishes, gentlemen?

MR. GILLEN: We discussed that request, a copy of the Judge's charge; and frankly, we find it hard to understand the whole charge, whether the jury would want it, perhaps they want portions thereof. If we could have a clarification.

THE COURT: Like what "all" means?

MR. GILLEN: Well --

THE COURT: All right, we can ask them.

THE CLERK: Yes, sir; if you'll bring the jury in.

(Whereupon, jurors entered the courtroom.)

THE COURT: We have complied with your number one request. The delay and taking up issue with your number two request -- odd as it may seem, lawyers,too, have to eat and they went out for lunch. I couldn't take this opportunity until they were able to get back

from lunch, which they have now done.

And, the inquiry they make, I should say the reason why you are in here, is that it is not usual in this part of the country to give a copy or copies of the Court's charge to the jury, but the question is, was there some particular part of the charge that you wanted to have your recollections refreshed on,or an explanation, or you would just like to have the whole thing, or what?

THE FORELADY: They wanted to hear the four points again.

THE COURT: Will counsel step up for just a minute?

(Whereupon a side-bar conference was had.)

THE COURT: You could read them to them, or run a copy to give to them, whatever you want to do.

MR. LEONE: Give them a copy.

MR. GILLEN: Yes.

MR. RITCHIE: That's fine.

(Whereupon side-bar conference was concluded.)

THE COURT: We'll make copies for you.

(Whereupon the Court instructed the Deputy Clerk to photostat Pages 7 and 8 of the Judge's charge to give to the jury.)

(Whereupon at 4:00 p.m. Court stood in recess.)

(continued on next page)

MP:jm
T2pm

(Following recess.)

THE COURT: The jury apparently wants to get a twenty minute start on what I said earlier today. I said around 5:20 and the jury said, "We can't come to a decision today."

THE CLERK: Note marked Court Exhibit 2.

THE COURT: I guess we had better go along with what they say. If we don't, we don't know whose ox will get gored.

(The jury thereupon entered the courtroom.)

THE COURT: We have your note, members of the jury, that you will not be able to reach a decision today. And I assume you mean by that you'd just as soon go home now as a few minutes later.

I should tell you that we have allowed jurors to separate, this is something relatively new. The first thousand years or so, juries were not allowed to separate after they were first sworn to hear a case. But as time has gone on and the cases have been tried with greater care and over a longer period of time, it has become increasingly practical that juries be allowed to go home nights during the trial. Finally, they were allowed to have their lunch separately and go home at night. The last step was to allow juries to separate after they have received the case for

their determination. That was a relatively new development.

I tell you this little bit of background to impress on you that it is done really with the idea that you will be able to treat the case as wholly private to each of yourselves, just as successfully as if you were kept together and without any outside intrusion. That is what the whole of it is, to make sure there is no intrusion on your deliberations. You are the only people in the entire world who are competent to decide this case. Only you have heard the sworn testimony and seen the exhibits which Court and counsel have looked at together to make sure that they can be seen by you. All the rest of us have our heads filled with a lot of irrelevant material and have different points of view. Only you have been sworn to decide the case in accordance with the evidence and heard nothing but the evidence and have been selected because you are completely disinterested. That, by the way, makes you an unbeatable weapon, tool, implement, call it what you will, for deciding the case. No one else can be the least bit of help to you in arriving at your decision.

And strangely enough, the people with whom you have most confidence in whom you would first turn to

for advice are exactly the people whom you shouldn't turn to now because this is one thing on which only you are the experts. And nobody else can do anything to help you because you are the people who have the data.

So until tomorrow morning, the administration of justice is in your separate trusts, and you must not under any circumstances communicate with anybody about the case.

Now, when you do separate and come together, please do not discuss the case if, for example, two or three of you go home together. Do not discuss the case together in the absence of the other jurors because just as sure as shootin' something will be said which to some other juror might be of importance and simply because it has been said amongst two or three it might never be repeated and those other jurors would never quite know why that group's thinking got where it did and would miss the benefit of the deliberations which should belong to you as a body which is what you are for the duration of the case.

Please, do not discuss the case until you are all together again in the morning and are able to discuss it as all twelve of you, as a jury.

Good night and come back tomorrow at ten.

Come directly to the jury room at ten o'clock. Don't check in downstairs, Mr. Walsh will take care of all that. Go straight to the jury room and if all the exhibits are in that envelope, seal it up.

THE CLERK: I think they will all fit in one, but if not, there are two envelopes.

THE COURT: Give it to the Marshal.

Good night and see you tomorrow.

(The jury left the courtroom.)

THE COURT: All right, gentlemen.

(A recess was taken at this time until Wednesday, October 23, 1974.)

* * * * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

JOHN DE LISO, JOHN MC NAMARA, THOMAS MC NAMARA, ALPHONSE MEROLLA, and ALPHONSE M. MEROLLA, : 73-CR-442

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 23, 1974

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

MICHAEL PICOZZI
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorney for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, FBI

(Time Noted: 2:10 p.m.)

THE COURT: We have a message from the jury reading: "We have reached a verdict."

THE CLERK: Marked as Court Exhibit 3.

(The jury is in the jury box.)

THE COURT: We have your message, members of the jury, that you have arrived at a verdict.

THE CLERK; Madam Forelady, how do you find as to the defendant John De Liso?

MADAM FOREMAN: Not guilty.

THE CLERK: How do you find as to the defendant Thomas McNamara, guilty or not guilty?

MADAM FOREMAN: Guilty.

THE CLERK: How do you find as to the defendant Alphonse M. Merolla, guilty or not guilty?

MADAM FOREMAN: Guilty.

THE CLERK: How do you find as to the defenant Alphonse Merolla, guilty or not guilty?

MADAM FOREMAN: Not guilty.

THE CLERK: You say you find as to the defendant John De Liso not guilty. You say you find as to defendant Thomas McNamara guilty. You say you find as to the defendant Alphonse M. Merolla guilty. You say you find as to the defendant Alphonse

Merolla not guilty. And so say you all?

MR. GILLEN: May we have a poll?

THE COURT: Poll the jury.

THE CLERK: Madam Forelady and ladies and gentlemen, you have heard the verdict that the Court has received, finding the defendant John De Liso guilty -- no, finding the defendant John De Liso not guilty; Defendant Thomas McNamara guilty, finding the defendant Alphonse M. Merolla guilty --

MR. LEONE: I am sorry.

THE CLERK; Finding the defendant Alphonse Merolla Merolla not guilty.

Madam Forelady, is that your verdict?

MADAM FOREMAN: Yes.

THE CLERK: Juror No. 2 is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict:

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR No. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE CLERK: Juror No. 9, is that your vefdict?

JUROR NO. 9: Yes.

THE CLERK: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes.

THE CLERK: Juror No. 11, Is that your verdict?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12, is that your verdict?

JUROR No. 12: Yes.

THE CLERK: Jury polled, your Honor.

THE COURT: That, members of the jury, completes your service as jurors in this case and you are discharged.

Also I believe it completes your service as jurors. If any of you need certificates of attendance you will ask the Jury Clerk.

On behalf of myself and other judges of the court and the counsel and litigants at this session of court, I wish to thank you all for your jury service.

We are very keenly aware of the time that we

take you away from your work to come here to act as jurors and we can only say we all of us regard jury service as absolutely indespensable and those of us most familiar with the courts consider our juries as the keystone of the arch of justice.

We are in your debt and we thank you.

THE CLERK: Please rise.

(The jury left the court room.)

MR. FISCHETTI: Before Mr. Gillian and Ms. Seltzer make motions, may I move that the bail for John De Liso be exonerated as previously --

THE COURT: Motion is granted.

MR. LEONE: I join in that motion on behalf of Alphonse Merolla.

THE COURT: Motion granted.

MR. RITCHIE: With respect to the defendant Thomas McNamara and the defendant Alphonse M. Merolla, the Government asks that the bail be continued.

MR. GILLEN: What I was going to do most respectfully is move first for a decision on the motions which your Honor reserved, particularly on the interstate commerce portion of the case.

In addition thereto, I most respectfully move

to set aside the verdict as inconsistent with the weight of the evidence against Thomas McNamara.

MS. SELTZER: I would join in that motion on behalf of Alphonse M. Merolla.

THE COURT: Is there anything further you want to do on the reserved motions for judgments of acquittal?

MR. GILLEN: We aregued the motions and most of the motions were argued on the aspect of interstate commerce.

Your Honor, when we discussed the charge we excepted to that portion of the charge wherein your Honor gave the affectation of interstate commerce, specifically about goods being installed. We made motions to the jurisdiction of the Federal Court in this particular matter. And we would move for a judgment of acquittal based upon that. As well as a judgment of acquittal based upon the evidence being inconsistent with the verdict insofar as the case relies and turns upon the testimony of Harry Goberman.

I feel no jury could find a verdict of guilty on this man's testimony. He has no respect for the efficacy of the oath and he expressed that during his entire testimony.

THE COURT: Ms. Seltzer?

MS. SELTZER: I think it has been argued sufficiently and I think it doesn't do any good at this point to belabor the issue.

I felt that during the course of the trial you in your own mind had severe misgivings to the jurisdiction of the court in this matter.

THE COURT: No, I am perfectly clear what I felt on this case as we stand today, the District Court was bound to include -- the Court of Appeals may well disagree with me in that I misread the case to date, I think that is unlikely.

The question which concerns me, I did want to make sure, was we have a reasonably clear cut record on interstate commerce. I besought counsel to try to get it all together free of the factual complications so it could be present on appeal if there were any adverse verdicts with complete clarity.

Counsel felt themselves unable to do that, but at least the record is taken with the charge I think reasonably clear and readily briefable.

Now, the other question as to whether under the somewhat revised attitude of the Court of Appeals towards what constitutes a sufficient case to go to

the jury, I have reservations relating to the quality of the testimony and the uncertainty of details within it.

I think it's a simple thing to say there was specific evidence of extortionate conduct and somebody said there was extortionate conduct in the use of force and threats of force. Said under oath. That is that.

Well, is that that?

When it is combined with other circumstances such as those that we have here? That was the area of my concern, whether there is any room for re-examination of the sufficiency of the case to go to the jury.

As I understand the rule, the evidence must be sufficient so that the jury can responsibly and without making a mockery of the reasonable doubt, find a verdict for the Government. None of us really knows what we mean by reasonable doubt when it is applied to a body of testimony which is at least formally sufficient.

And here certainly can say that the record is formally sufficient. The words are there if believed. I think the deeper question is whether

as you put it, Mr. Gillen, there is any justification for giving the case so largely dependent on the testimony of a man whose truth telling capacity is slight, is there any basis for a finding beyond a reasonable doubt in such testimony when it is not corroborated in detail.

I don't think MR. Ritchie's closing argument marshalled the corroboration very, very effectively. I am not sure if he got every bit of corroborattion, but he didn't miss much in presenting those to the jury.

The verdict I think we would have to say, was a discriminating one. If for those of us who are lawyers had had that in advance or formed a judgment in advance as to which two would be convicted, if we were told that the jury was going to differentiate defendants and going to convict only half of them, I think we would unhesitatingly have said they would have come in against Mr. Thomas McNamara and MR. A. M. Merolla. And that the evidence against the other two is in the one case tenuous and in the other is disfigured by a critical contradiction.

Nothing anybody can do about that. It just happened. That where I am. I just want to see if

you gentlemen had any new thoughts.

MR. GILLEN: The corroboration events allegedly outside the two instances of coercion or alleged extortion in this way -- it is only Mr. Goberman's words that are before the Court and before the jury as to what actually or allegedly happened in connection with extortion.

THE COURT: You see you have Allen Goberman saying he heard all the noises and when he entered the room he saw a gun being passed from hand to hand. Then the finding of the -- as a consequence of that meeting something was signed.

MR. GILLEN: The registration and --

THE COURT: Yes.

MR. MEISELMAN: The jury was told it was the gun handled by John De Liso. They disbelieved that part which would find him guilty.

THE COURT: It doesn't prove it wasn't handed between two people --

MR. MEISELMAN: The only testimony is it was handled by De Liso to somebody else.

THE COURT: To whom?

MR. MEISELMAN: I honestly don't remember. My mind is a blank.

THE COURT: I am afraid it was supposed to go to A. M. Merolla. The only question is whether it was handed by John De Liso or someone else. That's why I say the testimony against De Liso was the subject of a sharp contradi tion within its own four corners because of his identification of John De Liso as the man who was outside with him.

But the presence of a weapon, its display, and the sound of a fracas were testified to both by Harold Goberman and by his brother, and there was some -- you see, when you get into these questions -- well, heavens knows what the Court of Appeals will think about it which is quite another matter.

In such as case as this where it seem to me necessary to admit evidence of complaint and absence of complaints because of the way the case developed, that was some sort of corroboration.

It makes Gill's testimony very important. The testimony that Goberman did say that he had been worked over.

MR. MEISELMAN: Yet Allen said to Gill on two occasions there was no gun.

THE COURT: That's right.

MR. RITCHIE: Even that is disputed.

THE COURT: You see, what I mean by what is the standard by which these things go --

MR. MEISELMAN: If I may reiterate Mr. Gillen's argument and Ms. Seltzer's summation, Mr. Harold Goberman is completely immoral. I don't think that he knows --

THE COURT: This has nothing to do with it really. But I think the difficulty in such a case as this, the question is not whether Harold Goberman is capable of telling the truth, but whether for some reason or other he did tell the truth this time.

And I think Mr. Ritchie again very shrewdly made that his pitch. Pitch is a wrong word to use, rested his argument on that. He didn't claim this was a man of truth, but that this time he told the truth and in effect asked the jury to accept or reject Goberman's story on their conclusions to the extent to which it was corroborated.

Well, they seemed to have done exactly that. You see, the way the case developed, it was inevitable that Mr. Thomas McNamara's name and presence and protests and actions should be all over the case.

It couldn't be any other way. He was the principal in the case. And for one or another reason,

Mr. Alphonse Merolla was likewise all over the evidence. There was nothing that could be done about it.

I think, having that, the choice counsel had to make was a choice between a two-edged sword. Ms. Seltzer had no alternative except to try to explain Alphonse M. Merolla's presence by emphasizing he was frequently present and had an innocent reason to be there. You had to do that because of the risk that the jury was bound to believe he was there. There was nothing else you could do expect make his presence there appear to be in the normal course.

What else?

MR. MEISELMAN: Thomas McNamara was not present on June 28.

THE COURT: No, he was not.

He doesn't have to be there both times.

MR. MEISELMAN: Conceded. Except that the Government has not shown a connection between the events of June 5 and June 28 except by very tenuous inference.

MR. RITCHIE: There was a signature on that agreement.

MP:tr
T1/R2

THE COURT: No. You see, if you put your mind back, the things that hurt in a case of this kind are the things that juries spend much time on. In a case like this they look like an attentive intelligent bunch of people. The early drafting of that cancellation, the early date of it, the fact that Mr. Sfaelos had already been called in as early as June 9, Desmond O'Sullivan had been called in apparently working at the same time that -- unknown to him -- Kenneth O'Shea was working on the same case.

That the whole thing was part and parcel, and efforts, which climaxed in getting Goberman off the job.

Now, maybe that on June 9, that was still not resolved -- what was the date that was finally put on the cancellation, do you remember?

MR. GILLEN: June 6.

MR. RITCHIE: That is the testimony.

THE COURT: You see?

MR. MEISELMAN: Except, put on there by Timothy Shea who testified he was John McNamara's lawyer.

MR. RITCHIE: He testified he was --

THE COURT: The jury was given no reason to believe that John and his father were pulling in different directions.

MR. MEISELMAN: I agree. But on the contrary they were given no reason, in evidencewise, to believe they were acting in concert between John and Tom, except by inference.

THE COURT: Not acting in concert on the administration of corporate correctives, perhaps, but to some extent necessarily acting in concert to do what they thought had to be done to get this job done.

And the best possible way, I take it, increasingly looked like it should be done under new management.

I would like counsel to treat the motions as still under reservation and let me think about it some more and we can pass on it in finality on sentence day. I think I shall have to deny the motions because after a jury has decided, of course, your thinking is never quite the same.

It can't be. The man that can't be instructed by a verdict of 12 -- well, there is something wrong with him. That is very important here particularly

as I say when the verdict seem to me to be characterized by intelligent discrimination amongst defendants.

Are you well enough to go down to the third floor and talk to probation? It should not be difficult.

MR. GILLEN: We have a probation officer in the court room who happens to be my nephew Michael Gillen.

THE COURT: I noticed the name and didn't think it was a good idea having defense counsel writing probation reports.

YOu too, Mr. Merolla. And let me say to you, I know Mr. McNamara will be strenuously advised, and you will too, make all the information, family, job, background, available. It is very important.

You will be given notice --

MR. GILLEN: Is bail continued?

THE COURT: Bail continued.

MR. GILLEN: Your Honor, I most respectfully move at this time to dismiss the indictment against John McNamara for lack of prosecution. He was ready, willing and able to go to trial on this case two weeks ago and at the very last moment your Honor

told Mr. Walsh to call the jury the Government severed with the understanding they were getting immunity. Nothing happened.

THE COURT: In the confidential expectation, I would put it -- what do you say, Mr. Ritchie, is that right?

MR. RITCHIE: We had hoped to get immunity. I informed the Court as the trial wore on my desire to get immunity lessened because of the way the trial progressed.

Now, Mr. Gillen, as I recall it, agreed to the severance.

MR. GILLEN: With a gun to my head.

THE COURT: He didn't agree to the severance, what he said was, I think, it was the likelihood my client would never be tried, I am not in a position to resist it.

Roughly, that was his posture. If you had said to him --

MR. GILLEN: Your Honor, I would have insisted on going on right then and there had I known this.

THE COURT: He told you he was ready and the way the trial developed I think we have to agree he was. And since the case has already been once

tried, I could not see a fair gound for defering in the trial of a case and did not.

Well, I have never had a motion to dismiss for what of prosecution. Whatever else you want to call it in these circumstances if you see if there is a case on it --

MR. GILLEN: There is no case on it.

THE COURT: I don't think you will find anything.

MR. GILLEN: There is no case on it.

THE COURT: You don't know, you haven't looked. There might be one of the Federal cases --

MR. GILLEN: All I know is, your Honor, we were ready to try the case and I made the announcement and was completely taken by surprise with Mr. Ritchie's intention which was not announced until maybe two hours before -- or while we were setting up housekeeping.

I was taken completely by surprise.

THE COURT: Have you discussed it with counsel?

MR. RITCHIE: I hadn't.

THE COURT: Had not?

MR. RITCHIE: I had not even decided on the

course of action until Sunday.

MR. GILLEN: We came into the court room under the penality of treats of contempt if I wasn't here. Your Honor made that clear.

THE COURT: That's right.

MR. GILLEN: And other cases were put forth. Time was set aside for this trial. John McNamara was ready, willing and able to commence the case. I could not resist a severance or I wouldn't be a lawyer.

In all practicalities, I believed at that time that the Government would move to dismiss. Either that or I move for an immediate trial starting tomorrow of John McNamara.

THE COURT: I am busy tomorrow.

MR. GILLEN: I don't think I am being overly reactive on that. Quite frankly I believe the Government should move to dismiss.

Is it the Government's intention to go through the case again?

MR. RITCHIE: I cannot speak -- I need authorization before I do anything. I have just gone through this trial and there were certain verdicts in this trial that I am going to be discussing

along with the case and there are certain other aspects of the case that I am interested in.

I am going to be discussing this with my superior, the entire question of what happens in this case in the near future.

MR. GILLEN: I don't know what MR. Ritchie is talking about.

THE COURT: Nor do I.

MR. RITCHIE: Well, I have certain interests in this case. Certain interests I would like to develop. I have to speak with my superiors. I am not a sovereign unto myself. I can't speak at this time on what the United States intends to do.

MR. GILLEN: Your Honor, most respectfully, I ask for a trial date because I can't see this hanging over the head of John McNamara.

THE COURT: Do you want to see what time we can fit it?

MR. GILLEN: In asking for a trial date, I in no way intend to minimize my motion for lack of prosecution.

THE COURT: That is without prejudice to renew on papers or if you find some such situation --

MR. MEISELMAN: I would say that the severence

of John McNamara upset the strategy of the defense to a great degree, and hampered our defense.

MR. GILLEN: That is true even though both Mr. Meiselman and I worked together for the past two weeks, it became difficult.

I don't know if that was the Government's intention in the severance. It made our job burdensome and onerous, and only God knows what the result would have been if they had both been in there.

We don't know what would have happened if we had to be in here representing our cases. Mr. Meiselman would have been completely free of action --

THE COURT: I saw no handicap whatsoever. I could claim to be an expert, in a modest way, on the trial of the United States against De Liso, I heard it twice.

MS. SELTZER: Is it all right if Mr. Merolla leaves?

THE COURT: We are really talking about the United States against John McNamara at this point.

If John McNamara's case be tried, I think it could be tried in a week.

MR. GILLEN: I doubt it. I am not going to

stipulate to that. I would say it will go two to three weeks at least.

MR. RITCHIE: I think a slightly less time than this trial.

MR. GILLEN: I am sorry, it will not take less time.

THE COURT: It will.

MR. GILLEN: Quite frankly, with the defense of John McNamara, we have another record here. This is the second trial record we have. And Mr. Goberman, each time he testifiies he testifies differently, and I think I have every right to show that to the jury.

THE COURT: Economically and quickly.

MR. GILLEN: And consistent with the defense of John McNamara which I most humbly submit to the Court, should never be tried after what has occurred.

We are playing games now with the man's life.

THE COURT: Hardly.

MR. GILLEN: I most forcefully urge that motion. I think there is trickery going on and has been going on for the past two weeks. First they said there would be immunity. He was never called to testify and never anything --

MR. RITCHIE: I was told I would have to

subpoena him.

MR. GILLEN: Of course.

THE COURT: I don't see how I could possibly get it in before February 10. Maybe give it to another judge.

MR. GILLEN: No, I would ask that you keep the case. Your Honor is familiar with the case, has gone through it.

THE COURT: It is hardly an advantage.

MR. GILLEN: I don't know. If I were in your Honor's place I would be a little annoyed to try a case three times.

THE COURT: In the meantime, Mr. Ritchie, you can see what, if anything, the position of the Government is on this matter.

MR. RITCHIE: Yes, your Honor.

THE COURT: If some earlier time falls open we will get in touch with you both.

MR. GILLEN: I would like to know what attempts were made to get immunity.

MR. RITCHIE: There was an immunity request in Washington.

MR. GILLEN: To whom?

THE COURT: No, I think that Mr. Ritchie --

I think on the record stated it somewhere late last week. Didn't you?

MR. RITCHIE: I may have, your Honor.

THE COURT: I wouldn't swear to it, but I do recall your having said something to the effect that the Government or the people in Washington were expressing a reluctance in a father and son situation, in which -- that is the granting of immunity would result in trying to compel the son to testify against his father.

MR. RITCHIE: Yes, your Honor.

THE COURT: Just a minute. I am directed to page 1728: "Mr. Ritchie: With respect to John McNamara, the Government is not going to call him as a witness. There is still an immunity -- " and then I interrupted and said; "First, have you been authorized to grant him immunity?" And you said, "No. I was speaking this morning with an individual in Washington who stated to me there was a problem with immunity in this case because it is a father and son relationship. The Government may acquire authorization from the Attorney General next week. They are having problems because it is not the normal immunity situation. You have a father and son

relationship here. They have a policy against that sort of thing --

"MR. GILLEN: It is a wise policy."

And I said; "At least for this case." And Mr. Gillen said; "For the American family."

And Mr. Ritchie said; "I don't know whether I will get it or I am not saying I won't use John McNamara on rebuttal. With respect to a later trial for him, I don't believe that is a material issue in this trial and it will be something that I am sure your Honor will take up at a time if the Government proceeded to trial."

And Mr. Gillen said; "I think Mr. Ritchie has every intention of retrying Mr. McNamara as of this moment."

Then we go on to another matter in the transcript. So, it is pages 1728 and 1729 on October 18.

Okay, gentlemen.

MR. GILLEN: Thank you, your Honor.

MR. RITCHIE: Thank you, your Honor.

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Transcript of Proceedings

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 73 CR 442

ALPHONSE MICHAEL MEROLLA, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York
January 3, 1975
10:00 O'clock A.M.

BEFORE:

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

JOSEPH BARBELLA
OFFICIAL COURT REPORTER

APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

BY: DAVID J. RITCHIE, ESQ.,
Assistant United States Attorney

LEGAL AID SOCIETY
Attorneys for Defendant

BY: MS MARION SELTZER, ESQ.,
Of Counsel.

* * * * * *

THE CLERK: Criminal cause for sentencing, United States of America versus Alphonse Michael Merolla.

MR. RITCHIE: Good morning.

THE COURT: Good morning.

Mr. Merolla, do you wish to have Ms. Seltzer represent you on the sentencing proceedings here this morning?

THE DEFENDANT: Yes.

THE COURT: Is there any reason, Ms. Seltzer, why sentence should not be imposed at this time?

MS. SELTZER: No, your Honor. I would just at this time, renew the motions that had previously been made in this case.

I don't know if your rulings were final as far as the motion to dismiss under the argument that the case itself did not legally justify a Hobbs Act prosecution.

THE COURT: Well --

MS. SELTZER: I haven't found any new cases.

THE COURT: I think we -- the question of whether or not within Interstate Commerce and whether or not the offense mounted even if the evidence were accepted to an offense under the

Section-- those motions are denied. And I think there was a motion that was mentioned to set aside on the grounds that the verdict was against the weight of the evidence, and that the case should not have been submitted to the jury, -- that is, to renew the motion for a judgment of acquittal. That motion is denied.

Is there anything that you wish to say with respect to sentence before it is imposed?

MS. SELTZER: Yes, your Honor, there is. I did have an opportunity to read the probation report. And I think a lot of what it says indicates a lot of truth about Mr. Merolla's personality. There are several things in the report that disturb me a little. I think they can be explained.

THE COURT: What?

MS. SELTZER: The things that disturb me are, one, a statement that -- two statements that were allegedly received by the Probation Department or by the Government as to statements that were made to an informant and then subsequently made to the Probation Department. Those are the ones that Mr. Merolla has made statements to some people -- and the source of this is not given -- that he was with some crime family, and another statement in this report

saying that he allegedly is known to carry guns.

And another --

THE COURT: I mean I attach no weight to those statements.

MS. SELTZER: Another statement that he told somebody --the somebody not being in any way specified -- that he had received three thousand dollars for being involved with the events that are charged in the indictment of this case.

THE COURT: I think there was also a statement, however, that there was no hard evidence that any such payment had been made.

And if it wasn't made, it would be somewhat difficult to see how it could have been received.

MS. SELTZER: Your Honor, I would say that the most significant part of this probation report is the part that describes Mr. Merolla's emotional health. And I think that that may be an explanation for a lot about what happened in June of 1972.

I don't think you have had the opportunity because Mr. Merolla did not take the stand in this case, to deal with him on any great level. But I think that the description that is given on pages 20 and 21 and 22 of this report, -- well, I am not a psychiatrist -- but it would bear out even to a greater extent, the experiences that I have had with

him, and obviously the experience that other people would have with him. And I think perhaps if we analyze this case with an understanding of Mr. Merola's psychiatric background, maybe certain things fall into place.

Because I think possibly what happened, your Honor, is that there was some kind of a fight between Mr. Gulberman and Mr. McNamara. And I would say that the evidence in the whole case indicates that the relation between these two people was extremely poor, for an extremely long period of time.

And I think there is a very good possibility that Mr. Merolla was present, and that Mr. Merolla conceivably got into some kind of a fight or argument that was none of his business. And I think his emotional background and his temper and his -- I mean, you have read it. I don't want to read it here in open court.

But his whole psychiatric and emotional problem could very well be an explanation for this case. Because then otherwise, there is no other explanation as to how he could have gotten into a fight with Mr. Gulberman. I know through my own experience --

THE COURT: Isn't the difficulty with that

that he was not employed by McNamara Chevrolet, and would ordinarily have not been there?

MS. SELTZER: Apparently, from what I understand, Mr. Merolla was not working at that time. He received Social Security, because of his heart condition. And he hung around there a lot. His brother was the sales manager.

And if a man has nothing to do, and if he is not unwanted in a place, I think it would be perfectly appropriate under the circumstances, that he was hanging around and I think that does explain it.

I mean, I don't think that we have ever denied that he was not at the premises.

THE COURT: No, I don't think anyone suggested that.

MS. SELTZER: But I think there is an explanation for his being there.

And Mr. Merolla, I think, is the type of person who will get into another person's argument and just jump into it. It is none of his business. But hemight just find himself in the middle of somebody else's fight.

I submit, your Honor, that that is what is very possibly what happened here.

I can see it from my own experience with him.

And I think the statements in the Probation Report about guns or crime families, or money -- I think Mr. Merolla is a loudmouth, if you will excuse the expression. And I think Mr. Merolla conceivably could have made statements like that. I don't know. It is possible that he makes things up.

He's got illusions of grandeur. Honestly, he is that kind of person. But I don't think he is the kind of person who is hired and who premeditately conspired with anybody to commit the crimes that are alleged.

And I think that's the crux of the matter. Because Harry Doberman wasn't badly beaten up. The point is that if Alphonse Merolla got together with Tom McNamara and sat down, and they said that for X amount of money you have to take care of him -- I think it's a totally different crime, -- that if Al Merolla somehow got into a brawl with someone like Harry Doberman, and where the situation was that the injuries sustained were something less than a black and blue, I think it's a different situation then, your Honor.

And I think that in your sentencing of Mr. Merola, I would think that you would take that into consideration.

There's not much else I can say.

I don't want to go over the details of the Probation Report. I am sure you are familiar with his background.

THE COURT: Yes.

MS. SELTZER: I think even the arrests that are indicated on his rap sheet, indicate that he is the kind of person -- he was stopped once. The second arrest in 1972, apparently was because he was in a parking lot, I believe, with his brother --

THE DEFENDANT: Funeral parlor.

MS. SELTZER: And an officer not in uniform came over, and they got into an argument. So he was arrested. It wasn't -- the whole pattern, I think, is bad. He is not the type of person who would commit a premeditated crime. He is the kind of person who gets into fights.

THE COURT: I think I understand your argument.

Mr. Merolla, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No, your Honor.

THE COURT: Is there anything you wish to say on your own behalf, with respect to sentence?

Before it is imposed?

THE DEFENDANT: Yes, your Honor. I would like

to clarify that the -- my conduct on that funeral parlor incident with the officer. It was a matter of a car being blocked. And he did not identify himself as a police officer. And he came out cursing. And the case went even further. There is a departmental action against the officer.

But my lawyer said, "You're going to make the guy lose his job. He's got children to support." So he said, take the disorderly conduct and pay the fifty dollar fine. But there was departmental action against this officer. He was a rookie on the force. He pulled his gun immediately without identifying himself as an officer. And there were no blows struck. Just a matter of -- we just came out of the funeral parlor. It wasn't that we were hanging around on the corner.

And I would like to make mention -- I just came out of the hospital with another slight heart attack. And I find my daughter right now suffering with the same kind of problem at the age of 13. Which has me very much concerned. And I think it would be very detrimental to her if something would happen to me at this time. She has a heart murmur.

THE COURT: This is a much more complicated sentence problem, the whole case, because of its

background and all that.

But I cannot go beyond the jury's verdict and must accept that the jury did find that the incident principally relied on, did occur, and was within the intent of the statute. It is a very serious one.

Now, I think that the brandishing of the gun part of it, we do have to lay out of view, because of the equivalence that we really don't know what quite the jury concluded as to the gun because it wasn't indispensable to a conviction.

In other words, the government was entitled to state whether or not a gun was used, although that did have a prominent part in the evidence.

But the equivalence -- I mean this muddies the waters on what the jury had found to have been proved beyond a reasonable doubt with respect to the gun.

I don't think that this is a case in which it is possible to grant probation. I know the difficulties of your situation. But the statute is a serious one.

What I intend to do, however, is to impose a so-called split sentence, with a very brief period of imprisonment in a jail-type institution as a

part of a longer sentence.

On the jury verdict of guilty, on the single count of the indictment, you, Alphonse Michael Merolla, are sentenced to the custody of the Attorney General of the United States, or his duly authorized representative, who shall designate the place of confinement for a period of three years, pursuant to the provisions of Section 3651.

You will be confined for three months to a jail-type institution, and execution of the remainder of the sentence -- that is, 33 months, is suspended and you are placed on probation for five years, subject to the general conditions of probation, provided by the standing order of this court.

That will mean that during the entire probationary period, you will have hanging over you the suspended 33 month sentence. That will make it very important for you to keep in mind that if you do have this temperamental problem, that is something you have got to master.

Now, since you have been convicted, you are entitled to appeal to the Court of Appeals from the verdict in this case. And you must do that within ten days. You have been receiving legal aid. If you

are unable to afford counsel on appeal, and do wish to appeal, please let me know, and I will direct Mr. Walsh, the Deputy Clerk of the Court, immediately to file a Notice of Appeal on your behalf.

MS. SELTZER: Your Honor, Mr. Merolla is planning to appeal. And if Mr. Walsh would file that Notice, we would appreciate it. Otherwise, I will have to file it.

THE COURT: All right. Would you see that that is filed right away?

THE CLERK: Yes.

MS. SELTZER: Thank you.

THE COURT: I think that at this time, Mr. Merolla is free on ten thousand dollars personal recognizance bond?

MR. RITCHIE: Yes, your Honor.

THE COURT: Is there any objection to continuing that and staying execution pending appeal?

MR. RITCHIE: No, your Honor.

THE COURT: Very well.

Now, I think though, that you may have to reexecute the bond, to make it one that covers the appeal. I don't know. Because I don't know what the terms of it are. But anyway, the condition of release is that he execute a personal appearance

bond in the face amount of ten thousand dollars, without deposit of cash or other security therefor.

MR. RITCHIE: Yes, your Honor.

MS. SELTZER: Yes, your Honor.

Thank you, your Honor.

THE DEFENDANT: Thank you, your Honor.

THE COURT: I think the entire trial minutes have been transcribed. Has the charge and the -- the closing arguments and the charge, have they been transcribed?

MS. SELTZER: If they haven't, my Appeals Bureau will contact the Court Reporter.

THE COURT: Will you see that that is done right away?

MS. SELTZER: Yes, your Honor.

THE COURT: And the sentencing minutes, I expect.

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Transcript of Proceedings

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 73 CR 442

THOMAS MICHAEL McNAMARA, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

January 10, 1975

B e f o r e:

HONORABLE JOHN F. DOOLING, JR. U.S.D.J.

BURTON SULZER

OFFICIAL COURT REPORTER

APPEARANCES:

DAVID TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

BY: DAVID RITCHIE, ESQ.
Assistant United States Attorney

LEONARD MEISELMAN, ESQ.
Attorney for defendant Thomas M. McNamara

MICHAEL GILLEN, ESQ.
Attorney for John McNamara

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THE CLERK: Criminal cause for sentence, United States against Thomas Michael McNamara.

THE COURT: Good morning, gentlemen.

Mr. McNamara, do you wish to have Mr. Meiselman appear for you on the sentencing proceeding here this morning?

THE DEFENDANT: Yes sir.

THE COURT: Mr. Meiselman, is there any reason why sentence should not now be imposed?

MR. MEISELMAN: No sir.

Prior to the imposition of sentence may I respectfully renew the motions heretofore made, and particularly with respect to the motions concerning the jurisdiction, the motion --

THE COURT: On the interstate commerce grounds?

MR. MEISELMAN: Yes sir. And the motion to set aside the verdict as being contrary to the weight of the evidence, and for a motion of a directed verdict of acquittal.

THE COURT: I think you also -- a point was raised that on the indictment and the evidence an offense was not charged which was within the general intendment of statute.

MR. MEISELMAN: That is correct, sir.

THE COURT: The motions are denied. I think

we better leave the Court of Appeals these ever more complicated questions of interstate jurisdiction.

But on existing law I am able to entertain no doubt that the interstate jurisdiction -- that under the existing cases there is adquate jurisdictional foundation for the indictment, both in the allegations of the indictment and in the evidence that was brought forward.

MR. MEISELMAN: I know I have argued this point until your Honor is weary with it, but --

THE COURT: But you must preserve your exception to the ruling.

MR. MEISELMAN: Yes, your Honor.

THE COURT: And that is the intent of this motion, and I recognize that.

MR. MEISELMAN: We're ready your Honor.

THE COURT: Now, is there anything that you do wish to say with respect to sentence before it is imposed?

MR. MEISELMAN: If I may, your Honor. At the time of these sentences your Honor -- I think your Honor is also weary of the time worn cliche's that are so appropriate at these moments.

THE COURT: Well, it was a little different in Mr. McNamara's case. He is obviously a man of

previous good reputation and his sentencing matter has resulted in the sending in of a great many letters which I think he would be proud to see if he could.

MR. MEISELMAN: I might call to your honor's attention, there is a word which appears in the probation report, and I don't seem to recall the page it is on now, but --

THE COURT: What is that?

MR. MEISELMAN: I can't refer to the exact page, but it refers to Mr. McNamara as being authoritarian.

THE COURT: I remember the word.

MR. MEISELMAN: I think that it is the nature of a person's business and career, to be successful that he must be authoritarian --

THE COURT: In the sense in which used in the report, I think that is not the best chosen word in the world, but I think what the reporter meant was that generally speaking he knows his own mind, he means to put it inot effect and he has done so with success over a long period of years.

MR. MEISELMAN: What has happened here, your Honor, is that here is a man who was with very little formal education, rose above a background which was not of the most condusive to succeed and by dint of

hard, almost compulive work, and for which his first wife found it necessary to break up a marriage because of, built up what could be called a successful business and was in semi-retirement and his sons were to fall heir to this business and he came out of semi-retirement to build what could, I would say, could be best be phrased as perhaps an edifice to the hard work he had put in during his life time.

It is this edifice that caused the creation of all these difficulties. I cannot now argue the verdict of the jury irrespective of my personal feelings --

THE COURT: No, I cannot go behind the verdict.

MR. MEISELMAN: But I think that the evidence shows very well, very patently that if there was such a conspiracy, that at best Mr. McNamara was a passive party, passive even to the extent where circumstances may have created their own force which carried him along.

This is not a man, who by his history, by his background, shows any tendency to violence, shows any tendency to being an outlaw, shows any tendency to violating any law.

A man in 62 years who has a perfectly clean record, is well thought of in his community, has well

taken care of his family, has tended to his obligations, has taken care of his responsibilities; this is not a person who with intent, set out to violate a law, and at best, I say, if the law was violated, it was violated because of force of circumstances beyond, perhaps, even his control, or intent.

The finding of guilty here, your Honor, is tantamount to such a detrimental stigma, which will, in my opinion, undoubtedly cause the loss of his business, for which he has worked all of his life; undoubtedly will cause the loss of his franchise, will cause the loss of his private license, will cause him to remain in a community where he has been so highly regarded, as a convicted felon.

All ofthese causes are punishment, I think, which far exceed what has been done. Your Honor has noted Goberman on the stand during the course of the trial. I don't even wish to comment about Mr. Goberman, and I don't know whether there is such a defense in law as to the crime of extortion, a defense of provocation or extreme provocation --

THE COURT: That is, I think, the kind of thing that was intended to be raised by the argument that this was not the sort of a case that was within the intent of the Hobbs Act, but I did rule explicitly,

and if faced with the question again, would rule again that provocation is a reason for going to the authorities and not a reason for taking the law into one's own hands.

MR. MEISELMAN: And I would agree with that, your Honor, but I raise the issue in mitigation of sentence rather than as an excuse of the jury verdict.

THE COURT: I understand that.

MR. MEISELMAN: I also would like to call to your Honor's attention that by the testimony of all of the witnesses on the stand, Mr. McNamara participated in none of the violence; he was only present at one meeting. He was not present at the second meeting --

THE COURT: No.

MR. MEISELMAN: There was testimony by Mr. Goberman that although there was violence between him and Mr. McNamara, it was where he went to throw a punch at Mr. McNamara and Mr. McNamara allegedly tried to kick him.

But this was the violence between them. So that as far as Mr. McNamara was concerned, he was not present when violence took place, except with respect tothis minor altercation.

I respectfully submit, your Honor, that in view

of all the circumstances of this case, that your Honor temper justice with mercy.

THE COURT: Mr. McNamara, you need not stand. You may remain seated as you are.

Is there any reason why sentence should not be imposed on you at this time?

Is there anything that you wish to say, sir, on your own behalf with respect to sentence, before it is imposed?

THE DEFENDANT: Nothing, your Honor.

THE COURT: I assume in this case, that there is going to be an appeal?

MR. MEISELMAN: Yes, sir.

THE COURT: I, as you know, have already had the sentence and have sentenced Mr. Merolla. The sentence in this case was a split sentence, under Section 3,651, which provided that he was to be confined for three months to a jail-type institution, execution of the balance of the sentence of thirty three months was suspended, and he was given five years probation.

My intention here is to impose that much, that sentence also on Mr. McNamara, plus a fine.

Mr. McNamara, in the total over all perspective of this case, was the one responsible, in responsible

charge of the episode.

I could not, in conscience, treat him differently than Mr. Merolla. Now, he has a health problem, there isn't any question about it, that is a matter which I think we must be careful of, if there be an affirmance and the sentence might be altered in terms of how, when and where he enters upon the service of this time.

We have had these cases before and there isn't any necessity to treat a man whose health is somewhat impaired, as if it were not impaired at such a time, so that he need not be concerned with that aspect as it is fairly and completely covered in the pre-sentence report.

On the jury's verdict of guilty on the single count of the indictment, you, Thomas Michael McNamara, are sentencedto the custody of the Attorney General of the United States, or his duly authorized representative who shall designate the place of confinement, for a period of three years, pursuant to the provisions of Section 3651.

You will be confined for three months, to a jail-type institution, and execution of the remainder of the sentence, that is thirty three months, is suspended and you are placed on probation for thirty

three months, subject to the general conditions of probation provided by the standing order of the Court, and you are fined five thousand dollars.

Now, Mr. McNamara, you are entitled, of course, to appeal from the judgment of conviction that will be entered on this sentence. You must appeal within ten days. In view of the financial statement attached -- you supplied to the Probation Service, I am afraid there is no question of Legal Aid.

I take it you will file a Notice of Appeal and you will be mindful that it must be done within ten days.

MR. MEISELMAN: Yes, sir.

THE COURT: I believe that the whole of the record has been transcribed to the last day of testimony.

MR. RITCHIE: It has.

THE COURT: Do you know whether or not the closing arguments and instructions have been transcribed?

MR. RITCHIE: They were, your Honor.

THE COURT: So the only thing not yet transcribed will be today's proceedings.

MR. MEISELMAN: I don't know whether they were transcribed to us, but I can verify that.

THE COURT: Whether or not they have been, --

are you sure about, Mr. Ritchie?

MR. RITCHIE: I am fairly sure.

THE COURT: You must check that right away, because if that has not been done, then it will be necessary forthwith to order the transcripts, so that the case can be agenda'd to the assigned Judge in the Court of Appeals for scheduling in that Court.

MR. MEISELMAN: May I ask your Honor that there be a stay of execution, pending the appeal in this matter.

THE COURT: I believe that he is on personal appearance bond.

MR. MEISELMAN: A ten thousand dollar personal reoognizance bond.

MR. RITCHIE: I would ask that that be continued.

THE COURT: Defendant will be released upon his execution of a personal appearance bond covering the period of appeal, in the amount of ten thousand dollars, without deposit of security.

I think you may have to go before the Magistrate to execute a new formal bond, if the bond already executed, does not cover appeal.

MR. MEISELMAN: As a matter of fact, I have a bail slip here, which I think should be approved by Mr. Ritchie, and I intend to bring Mr. McNamara before

the Magistrate.

THE COURT: The execution is stayed pending appeal.

MR. MEISELMAN: Thank you, sir. I understand that on a recognizance bond, unless I am wrong, that the defendant is limited to the Eastern District of New York.

THE COURT: Yes. I thought that was pretty okay in the case of a Suffolk County man.

It isn't?

MR. RITCHIE: The original bond, I think, was broadened to the continental United States, and I would have no opposition --

MR. MEISELMAN: I would ask that particularly, with one exception, that it be the continent of the United States and Hawaii, only on one ground, and that is starting on January 19, there is a trip planned by the Association, which has already been paid for by the Association, and for which there can be no refund, giving three days in San Francisco and five days in Hawaii.

I would respectfully request that he be permitted outside the continental United States.

THE COURT: Why not make the bail limit then the United States?

MR. RITCHIE: Except Alaska, or shall we include that?

THE COURT: I don't think we can fairly discriminate against Alaska.

MR. RITCHIE: No opposition.

MR. GILLEN: Your Honor, in the matter of John McNamara, we have a trial date scheduled for February 10.

I have been in contact with Mr. Ritchie and Mr. Ritchie has informed me that he written up,I think it is form 900, I believe that is the form -- in any event, the purport of the dcoument is for a dismissal nolle pros of the case against John McNamara, and from what I understand, this has gone to Mr. Ritchie's superior, Mr. McGuire, and it has to go to Mr. Trager, and then it will go down to the Department of Justice, Criminal Division.

I wouldimost respectfully request your HOnor at this time, that that case of the United States versus John McNamara, be adjourned without date, pending the determination of favorable action on the dismissal notice.

MR. RITCHIE: Your Honor, I have no opposition to that.

THE COURT: It seemed to me at least sensible,

too, in the circumstances of this case, wait until the appeal is decided, because in the light, particularly of this most recent anti-trust case on interstate commerce, and the concern I expressed over how far it was going to go on the interstate jurisdiction question, it seems to be wide open.

MR. GILLEN: Your Honor is not saying that the Department should not act on the dismissal --

THE COURT: Oh, no, that is a quite separate question.

As I understand it, it is based under a different consideration. Is that correct, Mr. Ritchie?

MR. RITCHIE: Thatis correct.

THE COURT: He plans to do that quite independently, is that right, Mr. Ritchie?

MR. RITCHIE: Yes, sir.

MR. GILLEN: Frankly, your Honor, I agree with your Honor on the Appellate procedure, not trying a case when something is up in the air. However, I would like to put on the record, that in the event the Department does not act favorably upon Mr. Ritchie's recommendation, which I have no reason to believe that they will do otherwise, that it is my intention at that time, to make a motion for lack of prosecution, not from today on, for lack of prosecution as of the

date that the Government moved to sever John McNamara.

THE COURT: Based on that severance.

MR. GILLEN: Yes, sir. And we did have a long adjournment, as your Honor will recall, from the first date, and actually I was going to make my motion in the event there was not a favorable disposition-- I don't know whether the words are nunc pro tunc, but whatever they are, to bring it back to January on the motion.

I just wanted to put that on the record.

I am not criticizing anyone, but I wanted to make sure my position is clear.

* * * * * * * * *

United States of America vs.

United States District Court

Eastern District of New York

DEFENDANT: THOMAS McNAMARA

DOCKET NO.: 73 CR-442

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH 1 DAY 10 YEAR 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Leonard J. Meiselman, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.Code, Sec.1951 in that from on or about Mar. 1, 1972, up to and including June 28, 1972, both dates being approximate and inclusive, the defendant, with others, conspired, confederated and agreed together to obstruct, delay and affect commece and the movement of articles and commodities in such commerce by extortion and threat of physical injury and damage to the person and property of others

NTENCE
OR
BATION
RDER

The court asked whether [illegible] anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3 years pursuant to the provisions of Sec. 3651, to be confined for 3 months to a jail type institution and execution of the remainder of the sentence, that is, 33 months, is suspended and the defendant is placed on probation for 33 months subject to the standard conditions of probation as set forth in the standing order of this court dated Oct. 13, 1964. Defendant is fined $5,000.00. Execution of sentence is stayed pending appeal, limits extended to include all of the U.S.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ ★
JAN 10 1975
TIME A.M.....
P.M.....

PECIAL
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OF
BATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

ITIONAL
DITIONS
OF
BATION

The court orders commitment to the custody of the Attorney General and recommends,

Judgment 2339a

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

MITMENT
OMMEN-
ATION

2339a Judgment

ED BY
U.S. District Judge
U.S. Magistrate

Date 1/10/75

ONLY COPY AVAILABLE

only copy available

Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 442

UNITED STATES OF AMERICA

—against—

JOHN DE LISO, JOHN MCNAMARA, THOMAS MCNAMARA, ALPHONSE MEROLLA, ANGELO MEROLLA, ROCCO MEROLLA,

Defendants.

SIRS:

PLEASE TAKE NOTICE that Thomas McNamara, a defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered against him on January 10, 1975 in the above-entitled action.

Dated: New York, New York
January 14, 1975

DAVIS POLK & WARDWELL
By /s/ S. HAZARD GILLESPIE
A Member thereof
Attorneys for Defendant
Thomas McNamara
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: 422-3400

Notice of Appeal

To:

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